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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Peirce, Leslie & Co. Ltd., Kozhikode .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Taxable income—Income and capital receipt—Lump sum amount received by an assessee as compensation for termination of an agency agreement—If income or capital receipt—Tests to decide.

It is not always easy to decide whether a particular payment received by a person is his income or whether it is to be regarded as his capital receipt. Where an assessee company, as part of its other normal trading activities takes up certain managing agencies also, which if terminated would entitle the assessee to receive a lump sum compensation, the receipt of such amount would be part of the income of the assessee and not a capital receipt, since the other business activities of the assessee-company as its profit-earning machinery as a whole were not affected by the termination of any managing agency agreements, which was only one of several activities of the assessee. Normally a businessman would view the acquiring of a managing agency as a capital asset by itself as it is intended to produce income, and in certain cases where the whole trade of the assessee is built on such managing agency and the managing agency constituted the framework or whole structure of the assessee's profit-making apparatus, the receipt of a lumpsum amount as compensation for the cancellation of such an agreement of managing agency might constitute a capital asset and not income. But where the receipt of compensation for cancellation of a managing agency is in the course of the normal trading activities of the assessee and leaves the general framework of the assessee's business unimpaired such compensation will be part of the assessee's income.

Commissioner of Income-tax and Excess Profits Tax v. *South India Pictures, Ltd.*, (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : (1956) An.W.R. (S.C.) 215 : 29 I.T.R. 910 (S.C.) and *Anglo-French Exploration Co., Ltd.* v. *Clayson (Inspector of Taxes)*, (1956) 30 I.T.R. 309, followed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939) in R.A. Nos. 719 and 720 of 1953-54 and 790 to 794 of 1953-54 on its file for decision on the following questions of law, *viz.*

"(1) Whether the aforesaid sum of Rs. 60,000 compensation received from the Talliar Estates Ltd., is assessable as a trading profit under the Income-tax, Excess Profits Tax and Business Profits Tax Acts ?

(2) Whether the dividends of Rs. 36,820 and Rs. 32,603 received in the previous years for assessment years 1949-50 and 1950-51 from plantation companies, whose main business was agriculture, can be said to include any agricultural income exempt under section 4 (3) (viii) of the Income-tax Act ? and

(3) Whether the credit balances in the capital profits account, profit and loss account and E.P.T. Post-war refund suspense account form part of the 'reserves' of the assessee within the meaning of Rule 2 (1) of Schedule II of the Business Profits Tax Act ?"

M. Subbaraya Iyer, V. Sethuraman and *S. Padmanabhan*, Advocates, for the Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Commissioner.

*Case Referred No. 53 of 1954 and T.C. M.P. No. 42 of 1958. 3rd September, 1958. (12th Bhadra, 1880—Saka.)

The Order of the Court was made by

Rajagopalan, J.—Both the assessee and the Department were aggrieved, each with a part of the order of the Appellate Tribunal. On applications presented by them the Tribunal made a consolidated reference under section 66 (1) of the Income-Tax Act and submitted three questions for the determination of this Court.

The questions arose out of the assessment proceedings for the assessment years 1949-50 and 1950-51.

The second of the questions, which is easiest answered, ran :

"Whether the dividends of Rs. 36,820 and Rs. 32,603 received in the previous years for assessment years 1949-50 and 1950-51 from Plantation companies whose main business was agriculture can be said to include any agricultural income exempt under section 4 (3) of the Income-tax Act?"

The issue is no longer *res integra* and it is concluded by the decision of the Supreme Court in *Mrs. Bacha F. Guzdar* v. *Commissioner of Income-tax, Bombay*[1]. The question is answered in the negative and against the assessee.

We shall deal next with the first question

"Whether the aforesaid sum of Rs. 60,000 compensation received from the Talliar Estates, Ltd., is assessable as a trading profit under the Income-tax, Excess Profits Tax and Business Profits Tax Acts ?"

The relevant facts as found by the Tribunal are as follows : The assessee company is incorporated in the United Kingdom. It has an office at Kozhikode among other places in India. In the course of its varied business activities the assessee took up the managing agencies of Plantation companies, to which the assessee also acted as Secretaries. Whenever a managing agency was terminated, as for example, when the plantations were sold and the Plantation company itself wound up its operations the assessee was paid compensation, the quantum of which was decided by agreement. In 1945-46 the assessee company held such managing agencies for sixteen Plantation companies. Talliar Estates, Ltd., was one of such Plantation companies, and the agreement between that Company and the assessee was in 1937 (Annexure A). In 1945 Talliar Estates sold its plantation, which was in India, and the Company subsequently went into liquidation. On 24th July, 1945, Talliar Estates passed a special resolution which ran :

"That the Liquidator be authorised to pay the Secretaries and Agents, Peirce, Leslie and Co., Ltd., London, £4,500 by way of compensation for loss of office."

In accordance with that resolution the assessee received Rs. 60,000 in the year of account which ended on 30th June, 1946. That was treated as a trading receipt by the Department for the purpose of assessment to Income-tax, Excess Profits Tax and Business Profits Tax. When the assessee appealed to the Tribunal it purported to apply the principles laid down by this Court in *Commissioner of Income-tax and Excess Profits Tax* v. *South Indian Pictures Ltd.*,[2] and upheld the claim of the assessee, that this sum of Rs. 60,000 constituted a capital receipt not liable to tax. At the instance of the Commissioner the Tribunal referred to this Court the question we have set out above.

The decision of this Court in *Commissioner of Income-ax and Excess Profits Tax* v. *South Indian Pictures Ltd.*,[2] was reversed by the Supreme Court in *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures Ltd.*[3] But that may not conclude the question at issue. It is with reference to the facts of this case we have to decide whether the sum of Rs. 60,000 constituted a trading receipt or a capital receipt in the hands of the assessee.

The approach to the question should be that indicated by the Supreme Court at page 915 of the report in *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures Ltd.*[3] S. R. Das, J., observed :

"It is not always easy to decide whether a particular payment received by a person is his income or whether it is to be regarded as his capital receipt. Income, said Lord Wright in *Raja Bahadur Kamak-*

1. (1955) S.C.J. 68 : (1955) 1 S.C.R. 876 : (1955) 1 M.L.J. (S.C.) 27 : 27 I.T.R. 1.
2. (1951) 20 I.T.R. 605.
3. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 1956 An.W.R. (S.C.) 215 : 29 I.T.R. 910.

shya Narain Singh of Ramgarh v. *Commissioner of Income-tax, Bihar and Orissa*[1], is a word of the broadest connotation 'and difficult and perhaps impossible to define in any precise general formula'. Lord Macmillan said in *Van Den Berghs Ltd.* v. *Clark (Inspector of Taxes)*[2], that though in general the distinction between an income and a capital receipt was well recognised and easily applied, cases did arise where the item lay on the border line and the problem has to be solved on the particular facts of each case. No infallible criterion or test can be or has been laid down and the decided cases are only helpful in that they indicate the kind of consideration which may relevantly be borne in mind in approaching the problem."

The learned Chief Justice observed further on :

" The assessee before us is a company carrying on a business and it received the sum in question in connection with that business. We have, therefore, to ask ourselves as to what is the substance of the matter from the point of view of a businessman".

No doubt normally a businessman would view a managing agency as a capital asset, acquired to produce income. Some of the cases in which it was so viewed including *Commissioner of Income-tax, Bombay City* v. *Asiatic Textile Company, Ltd., Bombay*[3] were set out at page 719 of the report in *Rangaswami Naidu* v. *Commissioner of Income-tax*[4]. The learned counsel for the assessee was equally well founded in his contention that the managing agency could not be viewed even in the case of the assessee as part of its stock-in-trade. That the compensation of Rs. 60,000 was paid for the loss of the managing agency of Talliar Estates, among other rights secured by the assessee under the agreement (Annexure A) with the Talliar Estates, may not be conclusive to show that it was a capital receipt in the hands of the assessee, that is, that the amount was paid to the assessee as compensation for the loss of an item of its apparent capital assets.

The relevant facts in *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *South India Pictures Ltd.*,[5] as set out in the head-note were as follows :

"The assessee (South India Pictures Ltd.) which carried on the business of distribution of films entered into three agreements for advancing monies to certain motion picture producers towards the production of three films and acquiring the rights of distribution thereof. The agreements, *inter alia*, provided that the assessee would advance certain sums of money in instalments for the production of the films, the assessee acquiring the sole right to distribute the films for a period of five years from the date of release of each film. The assessee was to pay itself from the money realised by the distribution of the films its commission and the amount advanced to the producers and to pay the balance to the producers. The assessee had a charge by way of security on the negative and positive copies of the films for amounts due on account of advance. If the producers failed to deliver the films within the time specified, the assessee had the right to complete the picture at its own cost. On the expiry of the period of five years the assessee had to return to the producers all copies of the films and the balance stock of publicity materials. After the assessee had exploited to a certain extent its right of distribution of three films, the agreements were cancelled and the producers paid an aggregate sum of Rs. 26,000 to the assessee towards commission. In the relevant accounting year the assessee had distribution rights in respect of eleven films including these three."

With reference to these facts, Das, C.J., said at pages 916-917 :

" The termination of the agreement in each of the circumstances hereinbefore mentioned could well be said to have been brought about in the ordinary course of business and money paid or received by the assessee as a result of or in connection with such termination of agreements would certainly be regarded as having been so paid or received in the ordinary course of its business and therefore a trading disbursement or trading receipt.....In fact in the accounting year the assessee had distribution rights in respect of eleven films including these three. These three agreements would have come to an end on the expiration of the period of five years from the respective dates of release of the films and had only a part of the period to run, a fact which may also be relevantly borne in mind. The cancellation of these agreements must have left the assessee free, if it so chose, to secure other films which could be distributed in the place of these films and which might have brought in better box-office collections. In the language of Lord Haworth, M. R., in *Short Bros. Ltd.* v. *Commissoners of Inland Revenue*[6] the sum paid to the assessee was not truly compensation for not carrying on its business but was a sum paid in the ordinary course of business to adjust the relation between the assessee and the producers of the films. The agreements which were cancelled were by no means agreements on which the whole trade of the assessee had for all practical purposes been built and the payment received by the assessee was not for the loss of such a fundamental asset as was the ship managership of the assessee in *Barr, Crombie and Co., Ltd.* v. *Commissioner of Inland Revenue.*[7] Nor can one say that the

1. (1943) 2 M.L.J. 410 : L.R. 70 I.A. 180 at 192 : I.L.R. 22 Pat. 713 : 11 I.T.R. 513.
2. L.R. (1935) A.C. 431 : 3 I.T.R. (Sup.) 17 : 19 T.C. 390.
3. (1954) 27 I.T.R. 315.
4. (1957) 1 M.L.J. 340 : I.L.R. (1957) Mad. 708 : 31 I.T.R. 711.
5. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 29 I.T.R. 910.
6. (1927) 12 T.C. 955.
7. (1945) 26 T.C. 406.

cancelled agreements constituted the framework or whole structure of the assessee's profit-making apparatus in the sense the agreement between the two margarine dealers concerned in *Van Den Berghs Ltd.* v. *Clark (Inspector of Taxes)*[1]. Here were three agreements entered into by the assessee in the ordinary course of his business along with several similar agreements, these three agreements were by mutual consent put an end to. The termination of these three agreements did not radically or at all affect or alter the structure of the assessee's business. Indeed the assessee's business of distribution of films proceeded apace notwithstanding the cancellation of these three agreements."

After pointing out that what the South India Pictures, Ltd., entered into were composite agreements, and that even under the financing part of the agreements the South India Pictures, Ltd., did not acquire any capital assets, the learned Chief Justice proceeded to observe at pages 918-9 :

" Assuming that to start with the films constituted capital assets, the entire capital outlay had been recovered and the security had been extinguished and that part of the agreements which constituted financing agreements had been fully worked out and had come to an end and the three films ceased to be capital assets and the assessee was holding the films only under that part of the agreements which constituted the distributing agency agreements which only were subsisting. In the premises the amount received by the assessee was only so received ' towards commission ', that is to say, as compensation for the loss of the commission which it would have earned had the agreements not been terminated. In our opinion, in the events that had happened, the amount was not received by the assessee as the price of any capital assets sold or surrendered or destroyed or sterilized bit in the language of Rowlatt, J., in *Short Bros. Case*[2] the amount was simply received by the assessee in the course of its going distributing agency business from that going business. In our judgment, on the facts and in the circumstances of the present case, it falls within the principles laid down in *Short Bros. Case*[2] and *Kelsall Parsons and Co.'s Cases*[3], rather than within those laid down in *Shaw Wallace's Case*[4] or *Ven Den Bergh's Case*[1] or *Barr Crombie's Case*[5].

In the case of the assessee, taking up managing agency along with secretaryship to the Plantation company and other trading rights was part of the assessee's normal trading activities. The assessee dealt with among other things, the export of tea produced in India, and obtaining managing agencies and other rights from the Plantation companies certainly facilitated that trade in tea. The managing agencies the the assessee obtained were liable to termination, in which event the assessee received the compensation it was entitled to by agreement. We should point out that the agreement (Annexure A) was not a contract for securing simpliciter the managing agency for Talliar Estates. It was a *composite agreement* securing other rights as well to the assessee, which helped it in its trading activities in tea. The assessee was in a position to obtain such contracts with Planation companies because of its large experience in handling tea for export and also in managing plantations in India. Even confining ourselves to the managing agency, the loss of one of several such managing agencies could have little effect on the structure of the assessee's business even in tea or on its profit-earning apparatus as a whole. They endured virtually unimpaired by the termination of the managing agency for the Talliar Estates even as the business of the assessee remained unimpaired when other managing agencies were terminated in the past. The assessee's business in tea proceeded apace notwithstanding the termination of such agreements. To adapt the words of Das, C.J., at page 916 of the report in *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures*[6], the termination of the agreement with the Talliar Estates could well be said to have been brought about in the ordinary course of the business of the assessee and the money paid to the assessee as a result of or in connection with the termination of such agreements should certainly be regarded as money received in the ordinary course of the business of the assessee, and that therefore it was a trading receipt.

Mr. Rama Rao Saheb, learned counsel for the Department, referred us also to *Anglo-French Exploration Co. Ltd.* v. *Clayson (Inspector of Taxes)*[7]. Lord Evershed, M. R., said, at page 316 :

1. L.R. (1935) A.C. 431 : 3 I.T.R. (Sup.) 17 : 19 T.C. 390.
2. (1927) 12 T.C. 955.
3. (1938) 21 T.C. 608.
4. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 ; A.I.R. 1932 P.C. 138 ; 6 I.T.C. 178.
5. (1947) 15 I.T.R. (Sup.) 56 : 26 T.C. 406.
6. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 29 I.T.R. 910 (S.C.).
7. (1956) 30 I.T.R. 309.

"If the matter were *res integra*, I think that there is much to be said for the simple view that a sum of money received in consideration for the giving up or destruction of an agreement under which you look to earn an annual sum is capital and not income ; for in such case the sum received might be described fairly as the capitalised equivalent at the present time of income prospects."

After pointing out that the real question for determination was whether it was a profit or gain arising from the trade of the recipient within the terms of Schedule D, the learned Master of the Rolls proceeded :

"And the matter is not in any case *res integra*. The line of cases to which we have had our attention directed starting from the well-known triology : *Inland Revenue Commissioners* v. *Newcastle Breweries Ltd.*[1], *Short Brothers* v. *Inland Revenue Commissioner*[2] and *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ltd*[3], seem to me to emphasise that sums received for the cancellation of an agency or of other similar agreements which have been entered into by the recipient in the ordinary course of its trade will themselves, *prima facie*, be regarded as received in the ordinary course of trade unless the transaction involves a parting by the recipient with a substantial part of its business undertaking. The case of *Barr Crombie and Co., Ltd.* v. *Inland Revenue Commissioners*[4], was a case of that exceptional character."

At page 318 the learned Master of the Rolls pointed out :

"It is true that the facts show that Anglo-French (that was the Assessee in that case) held some eight agency and secretarial contracts and had done so for a considerable time with little variation, Nevertheless, the making of such contracts was part of the business of Anglo-French, and the cancellation of this one contract in no sense affected the 'profit-making apparatus' of the company which retained its offices and staff, in Johannesburg exactly as before".

The case of the assessee before us was certainly analogous to that the Court of Appeal had to consider in *Anglo-French Exploration Co. Ltd.* v. *Clayson (Inspector of Taxes)*[5].

In our opinion, in the circumstances in which the assessee company carried on its trading operations the amount of Rs. 60,000 constituted a trading receipt received in the usual course of its business activities.

We answer the first question in the affirmative and against the assessee.

The third question ran :

"Whether the credit balances in the capital profits account, profit and loss account and Business Profits Tax Post War Refund suspense account form part of the, reserve' of the assessee within the meaning of rule 2 (1) of Schedule II of the Business Profits Tax Act ?"

The relevant chargeable accounting periods for assessment to Business Profits Tax were: (1) 1st April, 1946, to 30th June, 1946; (2) 1st July, 1946, to 31st March, 1947; (3) 1st April, 1947, to 30th June, 1947 ; and (4) 1st July, 1947, to 30th June, 1948. The assessee company which as we pointed out was incorporated in the United Kingdom, prepared its balance-sheets on a sterling basis. It claimed an 'abatement' under rule 2 (1) of Schedule II to the Business Profits Tax Act of the amounts specified in paragraph 11 of the a statement of the case submitted by the Tribunal. The Tribunal upheld the claim of the assessee, and at the instance of the Commissioner referred the question set out for the determination of this Court.

The principles on which such claims for abatement should be decided, which were laid down by the Supreme Court in *Commissioner of Income-tax* v. *Century Spinning and Manufacturing Company, Ltd.*,[6] were explained and applied by a Divisional Bench of this Court in *Commissioner of Income-tax* v. *Vasantha Mills Ltd.*[7] It is on the application of those principles that we have to answer the second question which we have set out above.

The sums in question apparently represented the undistributed profits and were shown in the balance sheet partly as capital and partly as revenue receipts. During the arguments before us the learned counsel for the assessee limited the claim for abatement to the following amounts : £ 27,857 (capital profits account) and £219

1. (1927) 12 T.C. 925.
2. (1927) 12 T C. 955.
3. (1927) 12 T.C. 1102.
4. (1947) 26 T.C. 406 : 15 I.T.R, (Sup.)
5. (1956) 30 I.T.R. 309.
6. (1953) S.C.J. 651 : 1954 S.C.R. 203 ; 24 I.T.R. 499.
7. (1957) 32 I.T.R. 237.

(profit and loss account) for the chargeable accounting periods 1 and 2 we have mentioned above ; £ 9,812-0-5 (capital profits account) and £ 30-7-4 (profit and loss account) for the chargeable accounting periods 3 and 4. In addition the assessee claimed abatement with reference to the chargeable accounting periods, 2, 3 and 4 of another sum of £19,236 which amount was shown in the balance-sheets under the head Excess Profits Tax Post-War Refund Suspense Account.

Did these amounts constitute reserves within the meaning of rule 2 (1) for the relevant chargeable accounting periods is the question, which, as we have said, has to be answered in the light of the principles explained in *Commissioner of Income-tax* v. *Vasantha Mills Ltd.*[3] The Tribunal had no occasion to apply these principles when it upheld the claim of the assessee. Possibly the assessee had no opportunity to place before the authorities and the Tribunal the relevant material, on the basis of which the claim for abatement should have been investigated. The assessee preferred T.C.M.P. 42 of 1958 to produce further documents to decide the question. Even so the material furnished does not appear to be complete. It is, however, primarily for the Tribunal to investigate the facts and record the findings necessary before we can answer the question referred to us.

As pointed out in *Commissioner of Income-tax* v. *Century Spinning and Manufacturing Co., Ltd.*[2], and by this Court in *Commissioner of Income-tax* v. *Vasantha Mills*[1], the crucial date is the first day of the relevant chargeable accounting period. What was merely a mass of undistributed profits on that date will not constitute a reserve. The Supreme Court stated in *Commissioner of Income-tax* v. *Century Spinning and Manufacturing Co., Ltd.*[2]

> "the profits lying unutilized and not specially set apart for any purpose on the crucial date did not constitute reserves within the meaning of Schedule II, rule 2 (1)".

On this basis of what was pointed out by this Court at page 245 in *Commissioner of Income-tax* v. *Vasantha Mills Ltd.*,[1] what the Tribunal will have to decide in this case is whether, with reference to each of the sums we have mentioned above, any one possessed the requisite authority indicated on or before the crucial dates, with reference to each of the chargeable accounting periods, the manner of disposal or the destination of the funds of the company which constituted its profits. Was any portion of the profits specifically set apart for any purpose on or before the crucial date and was it so set apart by one having the requisite authority? It was on an erroneous view of the law that the Tribunal upheld the claim of the assessee, and as we said there was no occasion at that stage to investigate the question at issue on a proper basis. We therefore direct the Tribunal to examine the question afresh, after affording an opportunity, to both the assessee and the Department to place all the relevant material on record, and submit a further statement of the case. The documents filed by the assesse with T.C. M. P. 42 of 1958 will be forwarded to the Tribunal, and the Tribunal will afford the assessee an opportunity to produce further documents, if any, as are relevant for the determination of the question.

The Tribunal will submit the further statement of the case within three months from the date of the receipt of the records by the Tribunal. It may not be necessary to print the further statement of the case. The Department will furnish typed papers after which the case will be posted for disposal.

R.M. *Reference answered.*

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1. (1957) 32 I.T.R. 237.
2. (1953) S.C.J. 651 : 1954 S.C.R. 203 ; 24 I.T.R. 499.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

A. R. Cunniah Naidu .. *Petitioner**

v.

Thirunavukkarasu Chettiar and others .. *Respondents.*

Madras Buildings Lease and Rent Control Act (XXV of 1949), *section* 7 (3) (*a*) (iii)—*Owner's requirement of his premises for business—Owner originally carrying on business in partnership—Partnership dissolved and the business premises handed over to the other partners—Rent receipt, however, standing in the name of the retired partner—If would disentitle him from applying for possession of his own premises.*

Where a person carrying on business in partnership with others retired from the partnership and the premises where the business was being carried on was made over to the remaining partners, it is open to him to apply under section 7 (3) (*a*) (iii) of the Madras Rent Control Act for possession of his own business premises in the occupation of a tenant. The mere fact that the rent receipts for the rented building of the previous partnership still continued to remain in the name of the outgoing partner will not disentitle him to apply under the section so long as it is established that he is not in possession or entitled to the possession of the non-residential building. The fact that he was occupying the previous premises temporarily as a licensee does not also in any way disentitle him for seeking his remedy under the section.

Petition under section 12-B of Act XXV of 1949 as amended praying the High Court to revise the order of the Court of Small Causes at Madras, dated 29th September, 1956 and made in H.R.A. No. 174 of 1956 preferred against the order of the Court of the (House) Rent Controller, Madras, in H.R.C. No. 2763 of 1955.

T. S. Raghavachariar and *C. P. Rajagopala Ayyangar*, for Petitioner.

T. S. Krishnamurthi Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order of the learned Second Judge of the Court of Small Causes in H.R.A. No. 174 of 1956 against H.R. C. No. 2763 of 1955. The landlord who sought to evict his tenant is the petitioner in this Civil Revision Petition.

The petitioner's case was that he had been running a business in partnership with two or three others for over 40 years, orginally at No. 33, Bunder Street and later on at Nos. 32, 34, 35, 68, 71, 104 and 105 in Kotwal Bazaar. On account of differences between the partners of the firm, which was known as A.R. & Sons and A.R. Kanniah Naidu at Kotwal Bazaar, the partnership had to be dissolved, by a deed of dissolution, dated 29th April, 1955. The premises where this partnership was being carried on until the date of dissolution belonged to S.K.P.D. Charities, and when the partnership business was transferred from Bunder Street to the premises of the said charities, the lease-hold interest which the present petitioner had in the premises in Kotwal Bazaar belonging to the S.K.P.D. Charities became the property of the partnership that was being carried on. That is to say, the lease-hold interest became by agreement part of the assets of the partnership business. But when the dissolution came up, this leasehold interest continued to be an asset of the partnership business from which the petitioner retired. By reason of his retirement, he ceased to have any more interest in the lease of the premises, where the partnership was being carried on, even after the dissolution of the partnership. In and by the terms of the deed of dissolution, however, this petitioner was allowed, as a temporary measure, for a period of one year, to have his retail business in a portion of the premises, in which the partnership itself was carried on, in his capacity as a licensee and not as being entitled any more to the lease-hold interest which had become transferred in favour of the partnership business. It is also the case of the petitioner that he desired to carry on a wholesale business in plantains instead of the retail business, which he was forced to carry on after the dissolution of partnership.

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*C.R.P. No. 1404 of 1957. 11th February, 1959. (22nd Magha, 1880—Saka).

On 10th December, 1954, this petitioner had purchased premises No. 54, Bunder Street for a sum of about Rs. 55,000. This premises was in the occupation of the present respondents. With a view to ply his own business in the premises purchased by him the petitioner filed an application for eviction of the respondents tenants on the ground that the premises was required for his own use, and that he had no other premises in which he could carry on his wholesale business. Nor was he entitled to possession of any other premises at the time he filed the application for eviction of the respondents.

This application before the Rent Controller was enquired into and dismissed on the ground that the petitioner in order to avoid the inconveniences of the provisions of section 7 (3) (*a*) (iii) of the Act had conveniently given up his right to the possession of the shops in Kotwal Bazaar, the tenancy of which was still in his name and to the possession of which he was still entitled, in favour of the partnership firm and had made himself a licensee in a portion of the premises for a limited period. The learned Rent Controller also observed that the S.K.P.D. Charities had not recognised the change of tenancy from the personal name of the petitioner to the name of the partnership firm, A.R. & Sons, that the petitioner alone continued to be in possession of the said shops, that the possession of those shops could not be transferred to the firm, and that the petitioner had not even informed the S.K.P.D. Charities about the intended change, much less has the S.K.P.D. taken any action against him for eviction from those shops. Therefore the learned Rent Controller found that the petitioner, who was occupying for the purpose of a business which he was carrying on, non-residential buildings in the city, to the possession of which he was entitled under the Act, was not entitled to possession of the same under section 7 (3) (*a*) (iii) of the Act. In the result the Rent Controller, as already stated, dismissed the petition.

The petitioner thereupon preferred an appeal before the learned Second Judge of the Small Causes Court. The learned Judge of the Court framed two points for his consideration. The first one was whether the claim of the appellant was *bona fide*, and the second was whether he was not entitled to evict the respondents under section 7 (3) (*a*) (iii) of the Act. The learned Small Cause Judge agreeing with the Rent Controller on the first point held that the claim of the appellant was *bona fide*, but opined that that point did not arise before him for consideration. The only point which arose before him for consideration was whether the petitioner was entitled to evict the respondents from the premises purchased by him and now required by him for the purpose of carrying on his wholesale business. On this point the learned Second Judge of the Small Causes Court, however, agreed with the Rent Controller and he accordingly dismissed the appeal. He held that the appellant was occupying, for the purpose of his business which he was carrying on, a non-residential building to the possession of which he was entitled under the Act, and therefore the petitioner was not entitled to an order directing the respondents-tenants occupying the non-residential building in question to put him in possession of the same under section 7 (3) (*a*) (iii) of the Act. While dismissing the appeal the learned Second Judge also observed that there was no evidence before the Rent Controller to warrant his conclusion that Exhibit P-1, the deed of dissolution had been brought into existence to avoid inconveniences of the provisions of section 7 (3) (*a*) (iii) of the Act, and he held further that the dissolution of the partnership was not his own unilateral act and it came along after Exhibit R-2 series. Aggrieved against this order the petitioner has preferred this Civil Revision Petition.

The simple point that arises for consideration before me is whether in the eye of the law, the petitioner could be said to be still entitled to possession of a non-residential building in the city, town or village concerned, which is his own or to the possession of which he is entitled, whether under this Act or otherwise. That is to say whether the petitioner satisfies the conditions stipulated in section 7 (3) (*a*) (iii). Section 7 (3) (*a*) (iii) provides that a landlord, may subject to the provisions of clause (*d*) apply to the Controller for an order directing the tenant to put the landlord in possession of the building, in case it is any other non-residential

building, if the landlord is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled whether under this Act or otherwise. The evidence in this case is clearly to the effect that until the date of dissolution of the partnership evidenced by Exhibit P-1 in the case, the petitioner was occupying for the purpose of his own business a non-residential building in the city, to the possession of which he was entitled under a lease which he held from the S.K.P.D. Charities. It is also in evidence that the rent for this building was being paid by the partnership, until the dissolution of the partnership, though the lease stood in the name of the petitioner. It is also in evidence that after the dissolution of the partnership, no change has been made in the name of the person who is said to be the tenant in respect of the premises in which the partnership was still being carried on by the rest of the partners. As observed by both the Courts below, though the S.K.P.D. Charities have been receiving the rent for the premises from the partnership business, still they have not taken any steps to have the tenancy agreement executed by the partnership which is actually in the enjoyment of the premises, since the date of the dissolution to the exclusion of the petitioner. It is not disputed that after the date of the dissolution, the petitioner has lost his right to the leasehold interest in the premises where the partnership was being carried on, he having got out of the partnership and having taken just a portion of the premises as a licensee for a temporary period. It is conceded on both sides that after the dissolution of the partnership, the petitioner was carrying on only a retail business. According to the petitioner, the purpose of his having purchased the property in question was to carry on a wholesale business, and that it was also his intention to carry on such wholesale business in premises belonging to himself. There is at any rate no evidence contra. It was in those circumstances that he put in his application before the Rent Controller for evicting the tenants from the premises purchased by him in December, 1954. The question then to be considered is whether notwithstanding the fact that the tenancy in respect of the premises where the partnership business is carried on remained in his name nominally, and despite the fact that the petitioner had gone out of possession of those premises by virtue of the terms of the deed of dissolution and also the fact that he had continued in a part of the premises as a mere licensee for a period of one year, he could still be considered to be entitled to possession of the premises where he was carrying on business. The correct answer to this question would indeed decide the issue in this case.

The learned counsel appearing on behalf of the petitioner has contended that when once the dissolution had taken place and as has been held by the Court below that there was no lack of *bona fides* in the dissolution and when once by virtue of the terms of the dissolution the tenancy interest in the premises had been made over to the rest of the partnership, who were still carrying on business in the premises, and the petitioner himself having gone out of the premises by virtue of the very terms of the deed of dissolution, it cannot be said that the petitioner was any more entitled to possession of the premises under the Act or otherwise. He further argued there was nothing inherently wrong, nor was it incompetent on the part of the petitioner to have entered into the dissolution of partnership under which he could make over the right to the tenancy in favour of the rest of the partners of the dissolved firm to the exclusion of himself. Such a transfer of right to a tenancy in favour of a partnership by one of the partners, when that tenancy had become one of the assets of the partnership by reason of the conduct of the parties to the partnership, has been recognised to be a valid act on the part of the out-going partner and no impropriety or illegality could be attached to the transfer of interest made by the out-going partner.

The decision in *Devarajulu Naidu* v. *Ethirajavalli Thayaramma*[1], has been cited by the learned counsel for the petitioner in support of this contention. In so far as the dissolution of the partnership has not been brought about with a view to

1. (1949) 2 M.L.J. 423.

evade the consequences of section 7 (3) (*a*) (iii), but has been *bona fide* and as a result of that deed of dissolution the petitioner has lost his right to possession of the premises where the rest of the partners are still carrying on business to his exclusion, it is difficult to hold that the petitioner is still entitled to possession of those premises. It may be that even though he has lost possession of the premises where he as one of the partners was hitherto carrying on business the receipts were still being issued in his name, notwithstanding the fact that he had ceased to have any more right to possession of that property, and it may be also that there has been no change in the records of the S. K. P.D. Charities. Still the fact that he is no more entitled to possession of the premises which he has ceased to occupy and had allowed the rest of the partners to continue in occupation to his exclusion, cannot be seriously disputed. If he attempts to get back possession of the premises in the exercise of any claim of right to possession, surely he will not succeed, and in the face of the terms of the deed of dissolution his claim any more to the possession of the property in which he was carrying on business until the date of dissolution, would not be upheld by any Court. He would easily be non-suited by reason of his having entered into the deed of dissolution, whereby he had given up his right to the possession of the premises where he was hitherto carrying on business as one of the partners of the firm which now continues to be in possession of the property. Therefore it cannot be argued with any justification that the petitioner is still entitled to possession of the premises where he was once carrying on business. If that is the actual situation, then he will certainly come within the scope of section 7 (3) (*a*) (iii) and will be entitled to possession of the premises which is now under the occupation of the respondents, since the petitioner wants those premises for carrying on his business.

The next question is whether it has been established that the petitioner actually wants the premises which is in the occupation of the respondents for his own business. On the facts of the case there can be little doubt that the petitioner, who is a plantain merchant and who has been a partner of a bigger firm does require the premises purchased by him for his own wholesale business. The location of the premises in an area where the premises are will be suited for non-residential purposes. The fact also is indisputable that when he filed the application for eviction of the respondents he was occupying a portion of the previous premises only as a licensee and that too for a temporary period and on the lapse of that temporary period he will be without any premises of his own for carrying on his business. Even the ground that he wanted to expand his business from being a retail one into a wholesale one would also be a justification for his requiring his premises from the tenants. The decision in *Narayana Rao* v. *Mt. R. D. Swame*[1], has been cited by the learned counsel for the petitioner in support of his contention that where a petitioner does need a premises for carrying on the business, it follows that his need was a genuine one. In that decision it was however observed that it may be that he wanted to expand his business to earn more money or that he wanted to free himself from the shackles of the Rent Control Order. Even so, what he wants is within the law and as such he is, when he made the application, entitled to have the premises vacated. The principle of this decision would apply to the present case. As already observed, there is no justification for refusing the petitioner the use of his own premises when he is in dire necessity, not merely for his carrying on his own business, but also for the expansion of his business, particularly when he had lost possession of the premises in which he was hitherto carrying on business by virtue of the terms and conditions of the deed of dissolution referred to above.

In *Nagamanickam Chettiar* v. *Nallakanna Servai*[2], the learned Chief Justice of this Court has held that the principle of section 7 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act which provides for a landlord requiring additional accommodation for the purpose of a business he is carrying on, may well apply to cases arising under section 7 (3) (*a*) (iii) of the Act also. He has held further that where a landlord who is carrying on business in camphor in a rented building requires his own building for installing a power-driven machinery

1. A.I.R. 1953 Nag. 271. 2. (1957) 1 M.L.J. 182.

for manufacturing camphor, which could not be done in the rented building, even though there may be no threat of eviction from the rented building and there is no question of additional accommodation it is a case of a landlord requiring accommodation necessary for carrying on his business with the aid of power-driven machinery and he is entitled to maintain an application for eviction of the tenant. The principle of that decision will also apply to the facts of the present case.

What one has to consider in a case like the present one is as to whether the petitioner is in substance entitled to possession of any building which he was occupying for the purpose of his own business. The mere fact that the landlord had not been informed of the changed situation in which the petitioner lost his right to possession and had become disentitled to possession would not really make any great difference, if by any legitimate act of his he had become no more entitled to possession of the building in which he was carrying on a business hitherto.

In *Seethalakshmi Ammal* v. *Judge, Court of Small Causes, Madras*[1], the Honourable the Chief Justice and Somasundaram, J. have observed that the material provision of the Madras Rent Control Act does not require the landlord to establish more than that he requires the house for his own occupation and that he is not occupying a residential building of his own in the city, town or village concerned. No doubt he has to satisfy the Controller that his claim is *bona fide*. But the fact that a person is not urgently in need of a house cannot lead to the conclusion in law that his claim for eviction is not *bona fide*. A purchaser of a house applying for eviction of the tenant is not required to establish that he was driven to the necessity of purchasing the house and that he was urgently in need of the same. This decision also is authority for the proposition that has been advanced by the learned counsel for the petitioner in this case.

Therefore, considering the entire circumstances of the case, I am of the view that it cannot be contended any more on the facts of the present case that the petitioner is not entitled to the possession of his house for the purpose of carrying on his business in plantains and for that purpose he was not entitled to ask for a direction that the tenants in the premises purchased by him and which premises are required by him for his business should be evicted and the buildings placed in his possession.

In this view, the orders of both the Courts below cannot be sustained and they are hereby set aside. This Civil Revision Petition is allowed. There will be a direction that the tenants of premises No. 54, Bunder Street, do deliver vacant possession of the premises to the petitioner by the first of December this year. No costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

S. Viswanatha Pillai .. *Petitioner**

v.

The Indian Overseas Bank Ltd., Madras .. *Respondent.*

Civil Procedure Code (V of 1908), Order 43, rule 1 (d)—Refusal to set aside ex parte *decree—Appeal from—Power of appellate Court to stay execution of decree.*

It would be open to the High Court to grant a stay of all dependant proceedings while it is in seisin of the appeal against the order refusing to set aside the *ex parte* decree.

In an appeal against an order refusing to set aside an *ex parte* decree it is open to the appellate Court to stay the execution of the *ex parte* decree itself, even though no appeal is filed against the said decree.

Sundaram Chettiar v. *Valli Ammal*, (1934) 68 M.L.J. 16 : I.L.R. 58 Mad. 116, referred.

1. (1950) 1 M.L.J. (N.R.C.) 17.

* C.M.P. No. 6043 of 1959. 20th November, 1959.
* A.A.O. No. 221 of 1959. (29th Kartika 1881—Saka.)

Bhagwat Rajkoer v. *Sheo Golam Sahu*, (1904) I.L.R. 31 Cal. 1081 : 9 C.W.N. 123 and *Mohan Lal* v. *Shibdhari*, A.I.R. 1942 Pat. 146, differed.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct stay of execution of the decree in O.S. No. 58 of 1956 on the file of the Court of the Subordinate Judge, Tirunelveli, pending A.A.O. No. 221 of 1959 preferred to the High Court against the order in I.A. No. 276 of 1957 in the said O.S. No. 58 of 1956.

C. S. Rajappa, for Petitioner.

C. C. Thambi, for Respondent.

The Court made the following

ORDER.—This is an application for stay of execution of the decree in O.S. No. 58 of 1956 on the file of the Sub-Court, Tirunelveli, pending disposal of C.M.A. No. 221 of 1959. O.S. No. 58 of 1956 is a suit on mortgage laid by the respondent bank against the petitioner. There was an *ex parte* decree on 27th September, 1957. On 26th October, 1957, an application was filed by the petitioner for setting aside the *ex parte* decree on the ground that he was prevented by sufficient cause from appearing in Court on the date of trial. The learned Subordinate Judge dismissed the application to set aside the *ex parte* decree. C.M.A. No. 221 of 1959 is filed against the order refusing to set aside the *ex parte* decree. In the meanwhile the respondent has taken steps to bring the properties to sale. The petitioner therefore prays that there should be stay of execution of the decree pending disposal of C.M.A.

Mr. Thambi, learned counsel for the respondent, takes a preliminary objection that this Court has no jurisdiction to stay the execution of a decree when there has been no appeal against the decree itself, and when the only appeal before this Court is against the order refusing to set aside the *ex parte* decree. In support of his contention he has relied upon three decisions, namely, *Bhagwat Rajkoer* v. *Sheo Golam Sahu*[1], *Jamuna Prasad* v. *Magai Ram*[2] and *Mohan Lal* v. *Shibdhari*.[3] It is needless to say that the practice of this Court is not in accord with the principle of these decisions. According to that practice there is jurisdiction in the Court to grant, in proper cases, stay of execution of decree pending an appeal against the order refusing to set aside an *ex parte* decree. The decree which is made against the party will depend upon its validity upon the decision in the appeal against the order refusing to set aside the *ex parte* decree. For instance, if this Court were to hold that the *ex parte* decree should have been set aside, it would follow that the decree will automatically stand vacated. In the circumstances it can be said that the decree itself is something in the nature of a dependent one, pending upon the judgment in the appeal by this Court. I am of opinion that it would be open to this Court to grant a stay of all dependent proceedings while it is in seisin of the appeal against the order refusing to set aside the *ex parte* decree. A similar question arose in *Sundaram Chettiar* v. *Valli Ammal*[4]. That was a case in which there was an appeal against the order passed in the Original Side granting conditional leave to defend a summary suit. The Court held that it had power to stay execution although no appeal had been filed against the decree, so long as an appeal was pending against the order refusing leave to defend unconditionally. I am therefore of opinion that there is no merit in the preliminary objection.

On the merits, it has not been shown to me how the respondent will be prejudiced by an order for stay. There is no doubt that the petitioner will be prejudiced because if his contentions were right, his property would be sold even before there is any adjudication in the suit. It was stated on behalf of the respondent that the petitioner is in involved circumstances. I cannot understand how that will be a relevant consideration where the respondent has got the security of the mortgaged property, which has not been shown to me to be insufficient to cover the decree.

Under the circumstances, I grant stay of execution of the decree as prayed for.

R.M. ——— *Petition allowed.*

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1. (1904) I.L.R. 31 Cal. 1081 : 9 C.W.N. 123.
2. (1918) 35 I.C. 443.
3. A.I.R. 1942 Pat. 146.
4. (1934) 68 M.L.J. 16: I.L.R. 58 Mad. 116.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

K. M. Mohamad Abdul Kadir Rowther .. *Appellant**

v.

S. Muthiah Chettiar .. *Respondent.*

Words and Phrases—' Advance '—If and when a loan.

Interpretation of deeds—Legal maxim—' Expressio unis est exclusio alterius *'—Applicability—Advance—If loan.*

An ' advance ' means literally a payment before hand. In certain cases it may be a loan but not necessarily so. Where an advance is declared to be re-payable though only conditionally, it would lean to the side of a loan.

In interpreting deeds the applicability of the *maxim expressio unis est exclusio alterius* is not an absolute one and its application depends on the intention of the parties as discoverable upon the face of the instrument. The maxim ought not to be applied when its application, having regard to the subject-matter to which it is sought to be applied, would lead to inconsistency or injustice.

Where a certain sum of money was advanced by one party to another under an agreement that the same should be recouped in a certain manner, *viz.*, by the distribution of a film for a specific period, and it is also clear that the advance is to be repaid in any event it cannot be contended that if the proceeds of the film distribution was not sufficient to recoup the advance the same could not be recovered otherwise from the party liable. The clause relating to recoupment by the distribution of the film provides only an additional right of lien or set off and cannot be held to exclude the obligation to repay the advance or such portion of it as remained unpaid after the period of contract is over.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul, dated 16th February, 1955 and passed in Original Suit No. 7 of 1954.

R. Ramamurthy Ayyar and *A. R. Krishnaswami*, for Appellant.

V. K. Thiruvenkatachari, (The Advocate-General), *K. Rajah Ayyar* and *K. S. Ramamurthi*, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is an appeal against the decree in O.S. No. 7 of 1954 on the file of the Sub-Court of Dindigul. The plaintiff is the appellant.

The suit was for the recovery of a sum of Rs. 8229-2-4 representing the balance due on account with subsequent interest thereon. The appellant was a partner in a business run under the name of 'Amar Jyothi Talkie Distributors, Dindigul'. It will be convenient to refer to that firm as the appellant's firm. That partnership was dissolved and under an agreement between the partners the appellant became solely entitled to the moneys due from the respondent. The respondent was doing business in the distribution of films under the name of "Nethaji Picture Circuit' at Tiruchirapalli. They had acquired a right to the distribution of a Tamil film called ' Vikatayogi' in the Madurai district. On 6th February, 1947, they assigned that right to the Amar Jyothi Talkie Distributors for a period of 4½ years. The terms of the assignment were embodied in Exhibit A-2. Under that agreement the appellant's firm was to pay a sum of Rs. 15,000 as advance to the respondent against the right to distribute the film for a period of 4½ years. The respondent was to give 2 prints of the picture and all available publicities, and thereupon the appellant's firm was entitled at their discretion to exploit and distribute the picture at such rates and on such terms and conditions as they deemed fit. In the net realisation from the exhibition of the film the appellant's firm was to take a commission of 12½ per cent., while the respondent was entitled to the balance of 87½. The latter was, however, not to be paid over to the respondent till the entire sum of Rs. 15,000 advanced by the appellant's firm was wiped out, and that portion of the realisations was only to be credited as against the advance. When the entire amount of Rs. 15,000 was recouped by the appellant's

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* Appeal No. 387 of 1955.

5th August, 1959.
(14th Sravana, 1881—Saka).

firm, they were bound to pay the respondent in cash the 87½ per cent. of the realisations. There were also certain other stipulations in the agreement to which reference will be made later. It is admitted that both the parties performed their respective obligations under the contract; the appellant's firm paid the respondent a sum of Rs. 15,000 within four days of the contract, and the respondent delivered the two prints of the film and the accompanying publicities.

On 25th February, 1947, the appellant's firm found that M/s. Dinamani Talkies, Madurai were entitled to receive a sum of Rs. 2000 from the respondent on account of the exhibition of a certain film and they had to be paid that sum. This the appellant's firm did presumably at the request of the respondent and debited the same in the accounts against the respondent.

The picture 'Vikatayogi' was however not a success. At the end of the contract period it was found that the share of the respondent of the realisations for the exhibition of the film fell short of the sum advanced, *viz.*, Rs. 15,000. The accounts showed a debit balance of Rs. 7323-2-5 against the respondent. That amount included the sum of Rs. 2000 paid by the former to Dinamani Talkies at the request of the latter. A claim was, therefore, made for the payment of the amount due on accounts. The respondent at first complained that the loss was due to the inefficient management by the appellant's firm, but did not persist, in that charge. He suggested to the appellant to take an extension of the contract and minimise the loss; he also promised to settle the account. The appellants firm did not agree for an extension of contract, as the picture was evidently a flop. They insisted on the payment of their dues and issued a notice of demand. The respondent denied his personal liability to the transaction and took up the position that the only right of the appellant under the agreement was to recover the advance amount paid or such portion of it that might be due, from and out of the proceeds of the picture. Thereupon the suit, out of which the present appeal arises, was filed.

The respondent contested the action on the grounds, mentioned in his reply notice. He also denied the correctness of the account.

In the lower Court neither of the parties made any distinction between the balance of advance due, which could be claimed only on the basis of the nature of that transaction and the sum of Rs. 2000 advanced to the Dinamani Talkies at the request of the respondent, which was an independent transaction.

The learned Subordinate Judge held that, as there was a special provision under the contract that the amount advanced by the Amar Jyothi Talkie Distributors should be discharged out of the respondent's share of the realisations from the picture, there could be no right in the appellant to maintain the action personally against the former. On that finding he dismissed the entire claim although that finding would sustain only the dismissal of the claim in respect of the advance paid and would be no answer for sum of Rs. 2000 paid by the appellant for the respondent's benefit. Aggrieved by the decision the plaintiff has filed the appeal.

The sum of Rs. 8229-2-4 claimed in the suit comprises three items: (1) the refund of that portion of the advance which still remained undischarged at the end of the contract period, *viz.*, Rs. 5481-0-8 (ii) the amount paid to the Dinamani Talkies, Madurai on behalf of the respondent by the appellant Rs. 2000 (iii) interest from 22nd January, 1953 to 22nd November, 1953 at the rate of 12 per cent. on its outstanding balance Rs. 748-1-8.

As regards the first item of claim the question to be considered is whether the respondent would be personally liable to pay the balance of the advance amount that remained unrecouped. The decision of that question would depend on the terms on which the advance was paid either as expressed in the agreement, or implied in the circumstances of the case. The relevant clauses of Exhibit A-2 run as follows:—

1. The party of the second part shall on the execution of these presents pay Sri S. Muthia Chettiar a sum of Rs. 15,000 (Rupees fifteen thousand only) as advance by them in the accounts of the party of the first part, against distribution for a period of 4½ years. After the completion of the said period

the party of the second part should return all the copies of the prints and loan and saleable publicities to the party of the first part...........

. . . .

4. The realisations actually made of the said picture in the said territory after deduction by the party of the second part of the distribution commission as hereinafter provided shall be credited to the account of the party of the first part.

. . . .

6. That the party of the second part shall recover the advance of Rs. 15,000 (Rupees fifteen thousand only) from the share amounts payable to the party of the first part.

. . . .

8. That party of the second part shall, after the said entire advance amount is recovered, pay the party of the first part, his share once a month accompanied with a statement of account relating thereto as hereinabove provided.

. . . .

10. In case the party of the first part sells the said picture to a third party, the party of the second part shall be entitled to a commission of 5 per cent. (five) on the sale proceeds.

It will be seen from the agreement that the sum of Rs. 15,000 was to be paid by the appellant's firm as advance on account against distribution right of the firm for a period of 4½ years. There is no doubt that this sum was intended to be recouped by the appellant's firm. Till that amount is discharged the appellant's firm was entitled to take the respondent's share in the net collections. The agreement provides for the payment of the 87 per cent. of the net collections to the respondent after the entire sum of Rs. 15,000 was liquidated. But there is no provision in Exhibit A-2 for a case where the net realisations during the contract period fell short of the sum of Rs. 15,000. The question is whether a promise to pay that amount can be implied.

It is evident that the sum of Rs. 15,000 was not intended to be a security for the performance of the obligations under the contract by the appellant's firm, as that amount was agreed to be liquidated as and when moneys were received on the exhibition of the picture during the period of the contract itself. Nor can it be said for the respondent that the advance amount paid was a minimum guarantee by the appellant firm. It was contended for the appellant that the advance should be held to be a loan by the appellant's firm to the respondent and that the portion which remained undischarged should be held to be repayable, as there would be an implied promise to repay a loan. The learned advocate for the appellant urged that the word 'Advance' itself would imply a loan. 'Advance' means literally a payment before hand ; in certain cases it may be a loan but it cannot be said that a sum paid by way of advance is necessarily a loan. In *London Financial Association* v. *Kelk*[1], it was observed, that the words 'advancing' and 'lending' might each have a different signification, money might be 'advanced' without being 'lent' and that the relation of borrower and lender did not exist in a great variety of the transactions. In *Lincolnshire Sugar Company* v. *Smart*[2], Lord Macmillan observed that the term 'advanced' in the British Sugar Industry (Assistance) Act of 1931 was ambiguous and might either refer to the prepayments of what would become due in future or be a polite euphemism for loans ; but when 'advance' were declared to be 'repayable' (though only conditionally) they certainly would lean to the side of loans.

We are of opinion that in the present case it cannot be said that the advance of of Rs. 15,000 was by way of loan. Under clause (1) of the agreement, the advance of Rs. 15,000 was made on account against distribution for a period of 4½ years. Under the contract the actual exploitation of the picture was to be in the hands of the appellants firm and they would be receiving the monies. As the respondent states in his letter Exhibit A-18 the distribution right was assigned in the hope that the appellant's firm would be able to arrange to screen the picture more efficiently than the respondent and recover at least the advance amount. The respondent was to receive 87½ per cent. of the collections, and under the circumstances it can be only

1. L.R. (1884) 26 Ch. D. 107.
2. L.R. (1937) A.C. 697, 703.

held that the payment was intended as an advance of the respondent's share in the future realisation of the picture. A provision is therefore made for its recovery, but that cannot mean that the sum of Rs. 15,000 was given as a loan.

It was next contended that, even if the advance were not to be considered as a loan, the amount was intended to be recovered by the appellant's firm, and that, therefore an obligation to repay the sum should be inferred : there being thus an obligation to repay a personal liability would subsist.

The learned Advocate-General appearing for the respondent contested that position and contended that, where the parties reduced the terms of their agreement in the form of a solemn document providing *ex facie* for the respective rights and obligations of the parties thereto, there would be no scope for extending the express terms of the agreement by implication. Reliance was placed on the well recognised principle of interpretation of documents that where parties expressed the terms of their contract in a document they should be deemed to have expressed all their terms and conditions under which their rights *inter se* were to be regulated, and that the Court should not add to the terms expressly agreed to between the parties. It was contended that clause 6 of the agreement provided a particular mode of discharge of the obligation of the respondent in regard to the advance paid, and that would exclude any other mode of discharge *a fortiori* personal liability. The contention was based on the legal maxim "*expressio unis est exclusio alterius*" meaning that the express mention of one thing implies the exclusion of another. In *Brooms Legal Maxims*, 1911 Edition, page 504 this rule is stated thus.:

"........Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications ; the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."

In *Singjee* v. *Tiruvengadam*[1], a question arose whether a hypothecation bond contained a personal covenant. The bond stipulated that the debtor should pay the creditor every day a portion of the proceeds of sales of firewood in his shop. In default the creditor was authorised to collect amount due from the mortgaged properties. It was held that no personal covenant could be implied from the document.

In *Chennapatnam Gopal Rao* v. *T. Narasimha Rao*[2], there was a mortgage and a lease of an even date (two together were held to constitute the bargain) ; the lessee who was the husband of the mortgagee was directed to pay the interest due to the mortgagee. It was held that the transaction between the parties was a tripartite one under which there was no personal obligation on the part of the mortgagor in respect of the interest, and this was to be paid only by the lessee. Dealing with the argument that a general liability to repay money ought to be implied from the description 'money lent and advanced' the learned Judges followed the reasoning of Pollock, C.B. in *Mathew* v. *Blackmore*[3], to the following effect :—

"In the present case the question is whether a contract by parol can be implied for repayment when there is an express covenant under seal relative to it. The rule of law as well as of reason and good sense is *expressum facit ceassare tacitum* and where there is an express covenant that the defendant shall out of trust funds—pay the sum advanced, we think it impossible that, at the same time he made himself absolutely liable for the payment of it simpliciter ; and at all events to do so would be to create a contract by implication different from and much more onerous than that entered into by the express words used."

The rule however which is contained in the maxim, '*expressio unis est exclusio alterius*' is not a rule of law but one relating to the construction of documents. It is also applied in certain cases to the construction of statutes. It could only be a guide for the interpretation of a statute or document to ascertain the intention of the legislature or of the parties. It cannot always be held to be a certain guide for the ascertainment of the intention, as the exclusion of certain terms in a document might be due to the result of inadvertance, accident, etc. For example it is not uncommon to find in partnership agreements, the absence of a stipulation in regard to the sharing

1. (1889) I.L.R. 13 Mad. 192.
2. (1903) I.L.R. 27 Mad. 86.
3. 1 H. & N. 762.

of the losses between the partners. They either by reasons of sentiment or by reason that they do no anticipate loss in the venture, do not sometimes provide for the sharing of the losses. That does not mean that if the partnership sustains loss the partners are not liable to share the same. In such a case an agreement has always been implied for the sharing of the loss in the proportion in which the profits are agreed to be shared between the partners. The question whether a term in a contract had to be implied or not, would depend on the nature of the transaction and the intention of the parties.

The maxim '*expressio unis est exclusio alterius*' is not therefore an absolute one, and in *Brooms Legal Maxims*(10th Edition at page 444) it is stated :

> " Great caution is necessary in dealing with the maxim *expressio unis est exclusio alterius*, for as Lord Campbell observed in *Saunders* v. *Evan*[1], it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction ; thus where general words are used in a written instrument, it is necessary, in the first instance, to determine whether those words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied ".

The applicability of the maxim was considered by Wills, J., in *Colquhoun* v. *Brooks*[2] who observed :

> " I may observe that the methods of construction summarised in the maxim ' *expressio unis exclusio alterius* ' is one that certainly requires to be watched. Perhaps few so called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the ' *expressio* ' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind ; and the application of this and every other technical rule of construction varies so much under differing circumstances and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant ".

This statement of the principle was accepted by the Court of Appeal in *Colquhoun* v. *Brooks*[3]. Lopes, L.J., observed that the maxim was often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. He held that " *exclusio*" was often the result of inadvertence or accident, and that the maxim ought not to be applied, when its application having regard to the subject matter to which it was to be applied leads to inconsistency or injustice.

We have already referred to the intention of the parties as disclosed in Exhibit A-2 that the sum of Rs. 15,000 was to be recovered. Clause 6 of the agreement, in our opinion, was intended to create a right to lien or set off over the 87½ per cent. of the collection ; which otherwise would have to be paid over to the respondent. It purported to provide only an additional right and cannot be held to exclude an obligation to pay back the advance, or such portion thereof as remained unpaid after the period of the contract was over. That the advance was intended to be recouped or repaid is supported by clause 10. That clause provided for a case when the respondent proceeded to sell the picture, evidently during the period of the contract. It stated that in such a case the appellant's firm would be entitled to 5 per cent. of the sale proceeds. If one were to accept the contention of the respondent, it would follow that in a case where he proceeded to sell the picture to a third party the appellant firm would have to be content with the 5 per cent. of the sale proceeds of the picture and forfeit the sum of Rs. 15,000. This is manifestly unjust and would not have been the intention of the parties. In such a case it is but proper to infer that the appellant firm would be entitled to be paid back, the unrecouped portion of the advance and also the 5 per cent. of the sale price of the picture. We are, therefore, of the opinion that in the circumstances of the case the maxim cannot apply, and that the parties intended to adjust the advance sum of Rs. 15,000 at the end of the contract period, that an obligation to pay the unadjusted portion of the advance amount which remained due at the termination of the contract should be implied on the terms of the document, and that the appellant would be entitled to recover the amount due.

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1. L.R. 8 H.L. 729.
2. L.R. (1887) 19 Q.B.D. 400 at 406.
3. L.R. (1888) 21 Q.B.D. 52.

In the accounts submitted by the appellant to the respondent the sum of Rs. 2000 paid to Dinamani Pictures by the appellant's firm on behalf of the respondent was debited. The propriety of that debit was accepted by the respondent in Exhibit A-11 dated 28th February, 1947. No objection has been taken for the claim on the accounts except a vague statement in the written statement that the correctness of the accounts was not admitted. When D.W. 1 was examined, the learned Judge has made a note that the defendant's advocate stated that the parties were not at issue about the correctness of the accounts "at that stage". What the defendant's advocate meant by that concession and what really the learned Judge meant when he recorded the same, it is difficult to understand. The correctness of the account was relevant if at all only at that stage. It is unnecessary, however, to rest one's conclusion in this case on the mere admission of the defendant's advocate. From the fact that the propriety of the debit in regard to the sum of Rs. 2,000 was admitted by the respondent as early as 1947, the claim under the head should be held to be proved.

The question then is in regard to interest. The appellant claimed interest from 21st February, 1953 to 22nd November, 1953 at 12 per cent. per annum relinquishing the interest thereafter. The agreement does not provide for the payment of any interest. Under the circumstances the appellant would be entitled to get only interest at 6 per cent. from the date of demand. His claim under this head will be reduced by half and he will be awarded only a sum of Rs. 374-0-10 towards the interest.

In the result there will be a decree for Rs. 7855-1-6 with interest and costs in both the Courts.

R.M. ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

A. Rangaswamy Iyengar .. *Appellant**

v.

Pattammal *alias* Rajalakshmi Ammal and another .. *Respondents.*

Execution—Maintenance decree charging properties—Sale of charged properties—Purchase by maintenance decree-holder—Effect—Personal liability of judgment-debtor—If extinguished—Liability of other properties to be proceeded against in execution.

In execution of a maintenance decree in favour of a wife and daughter, it is not open to the husband-judgment-debtor to plead that his liability is extinguished by reason of the fact that the charged properties were bought in by the wife for arrears of maintenance at a Court sale in previous execution proceedings. Whether the charge be held extinguished or not by the Court sale in favour of the maintenance decree-holder herself the personal liability of the judgment-debtor under the decree is not extinguished, and hence the other properties of the judgment-debtor are liable and can be proceeded against.

Sanyasi Rao Dora v. *Suryanarayanamma*, (1936) 71 M.L.J. 538 : A.I.R. 1936 Mad. 964, followed

Jnanendra Nath v. *Sashi Mukhi*, A.I.R. 1940 Cal. 60 and *Thangavelu* v. *Thirumalaswami*, (1955) 2 M.L.J. 622, distinguished.

The remedy of the husband-judgment-debtor is to initiate proceedings to have the maintenance claims suitably reduced by Court in consideration of the properties purchased by the wife at the Court sale and the fact that she is in possession of the profits therefrom.

Appeal against the order of the Court of the Subordinate Judge of Chingleput dated 9th April, 1956 and made in E.P. No. 190 of 1955 in O.S. No. 27 of 1948.

A. Doraiswami Ayyangar, for Appellant.

T. Venkatadri, for Respondents.

The Court delivered the following

JUDGMENT.—The appeal is upon the short point whether, in execution of a maintenance decree in favour of a wife and a daughter, the husband and judgment-

* A.A.O. No. 294 of 1956. 11th September, 1959.

debtor (appellant here) can plead that his liability is extinguishd by the fact that the charged properties were bought in by the wife for arrears of maintenance at a Court sale in previous execution proceedings. The facts are not in dispute that there was such a Court sale, and the learned Counsel for the husband (appellant) contends that properties worth nearly Rs. 30,000 were knocked away by the wife at the Court sale for the inadequate consideration of Rs. 10,000, which was then the aggregate of the maintenance arrears. But, I note the fact that this sale itself is *sub-judice* in a litigation still pending in this Court between the parties.

However, this might be, the simple position that has to be considered is whether the husband can claim in such circumstances, that the wife holds the property purchased at the Court sale subject to further executability in respect of the continuing maintenance claim, and that, therefore, she must look to that property alone, or to the profits from that property for satisfaction of future maitenance. The argument is that where she is the Court-auction-purchaser, and even in a case where a third party is a Court-auction-purchaser, the maintenance claim is not extinguished by the purchase, and that the same properties continue to be liable for the charge. Certain observations of Basheer Ahmed Sayeed, J., to this effect in *Thangavelu* v. *Tirumalaswami*[1] in delivering the judgment of the Bench, are relied upon, particularly the dictum,

> "so long as the decree for the maintenance is a charged decree in respect of the property, any purchaser who buys the property in execution of the decree for arrears of maintenance, will only buy that property subject to the charge which still subsists in respect of future maintenance".

But I notice that these observations are *obiter*, the decision itself being the authority for quite a different position which does not concern us here, that a simultaneous charge in favour of two parties is not extinguished, where the execution is in respect of one charge alone. The decision of the Calcutta High Court in *Jnanendra Nath* v. *Sashi Mukhi*[2], is also relied on by the learned counsel for the appellant, for the view that the charge is not extinguished by the Court sale in the instance of such a charge for a continuing maintenance claim.

But the point now before us is not, strictly speaking, whether the charge is extinguished or otherwise. The point is whether the personal liability of the judgment-debtor (the husband) is extinguished , or whether his other properties are still liable for the maintenance claim, and can be proceeded against in execution by the maintenance decree-holders. Again, at least as regards the daughter, she is not the purchaser at the Court-auction-sale, and it is very difficult to see how she can be precluded from further executing her decree against the other properties of the judgment-debtor. Even as regards the wife, so long as the personal liability of the judgment-debtor is not extinguished, her proceeding against the other properties will be in order. It is not, however, as if the judgment-debtor is without a remedy. He can always initiate proceedings to have the maintenance claims suitably reduced by Court, in consideration of the properties purchased by the wife at the Court sale, and the fact that she is in possession of the profits therefrom. If the properties are worth much more, as alleged, the income will presumably be greater, and the present appellant can obtain a more enlarged relief with regard to reduction of maintenance, upon this basis. That is his true remedy, and he cannot sustain a defence at law that his other properties are not liable, because of some implied extinction of his personal liability altogether.

The point is covered by the Bench decision in *Sanyasi Rao Dora* v. *Suryanarayanamma*[3], which is precisely in point. As observed by Burn, J., therein, whether the charge must be held extinguished or not by the Court sale in favour of the maintenance-holder herself, the personal liability of the judgment-debtor under the decree is not extinguished, and hence other properties of the judgment-debtor are liable.

The order of the lower Court is, therefore, correct, and this Civil Miscellaneous Appeal, which fails, is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

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1. (1955) 2 M.L.J. 618 at 622.
2. A.I.R. 1940 Cal. 60.
3. (1936) 71 M.L.J. 538 : A.I.R. 1936 Mad. 964.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Muthu Muna Muthukaruppan Chettiar .. *Petitioner**

v.

The Deputy Commercial Tax Officer, Tiruchy Town III, Tiruchirapalli .. *Respondent.*

Madras General Sales-tax Act (*IX of* 1939), *section* 3 (1) *Proviso, and Amending Act* (*XV of* 1956), *section* 17—*Scope—Article of food and drink sold in a hotel—Refund of tax paid back to the assessee as a result of the enhanced rate being declared void by the High Court—Subsequent amendment giving retrospective effect—Demand for return of amount refunded—Validity.*

The petitioner, a hotel proprieter was assessed to sales-tax for (1953-54) at the rate of 4½ pies in the rupee applying the Provso to section 3 (1) as it then stood. At the hearing of his appeal to the Sales-tax Appellate Tribunal, the High Court had declared that the enhanced rate of tax provided by the Proviso to section 3 (1) was void . On this basis the Tribunal reduced the rate of tax to three pies in the rupees and refunded to him in September, 1956, the excess that was collected. Section 3 (1) was amended by Amending Act XV of 1956, on the basis of which the assessee was asked to refund the sum which was paid back to him.

Held : When the excess over three pies in the rupee was refunded to the assessee it was an amount lawfully due to him and was properly paid. If *ex-hypothesi* the refund was due—it was due because of the judgment of the High Court upholding the objection to the validity of the charging provision there could be no mistake in making the refund and the mere fact that the Proviso has been re-enacted with retrospective effect cannot have the effect of rendering the refund then made either illegal, unlawful or one made under mistake. The demand for the repayment of the amount refunded is not justified in law and has to be quashed.

Soundarapandian & Bros. v. *Agricultural Income-tax Officer*, (1957) 2 M.L.J. 434, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiotari* calling for the records and quash the notice issued by the Respondent bearing No. Rc. 2067/56/A-1, dated 26th March, 1957 and to award costs of this petition.

K. Venkataraman, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*) on behalf of Respondent.

The Court delivered the following

JUDGMENT.—These three petitions raise a common question regarding the proper construction of section 12-A of Madras General Sales Tax Act and sections 3 and 17 of Madras Act XV of 1956.

By an amendment effected to the Madras General Sales Tax Act, 1939 by Madras Act XV of 1949, a Proviso was added to section 3 (1) (*b*), the charging section under the Act, and it read :

"Provided that if and to the extent to which such turnover relates to articles of food and drink sold in a hotel, boarding house or restaurant, the tax shall be calculated at the rate of 4½ pies for every rupee if the turnover relating to those articles is not less than Rs. 25,000 ".

In effect this meant that whereas normally the standard rate of tax was 3 pies per rupee on the total turnover the rate of tax was enhanced to 4½ pies in cases where articles of food and drink were sold in hotels. The constitutional validity of this Proviso was challenged before this Court, and this Court upheld the objection and declared that the enhanced rate of tax for which provision was made by the Proviso was void as an unreasonable discrimination obnoxious to Article 14 of the Constitution.

This situation was, however, altered by an amendment effected to the General Sales Tax Act by Madras Act XV of 1956. By section 3 of this amending Act, the Proviso to section 3 (1) (*b*) which has been set out earlier, was replaced by a different Proviso reading

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* W.P. Nos. 503, 516 and 517 of 1957.

20th November, 1959. (29th Kartika, 1881—Saka).

"Provided that if and to the extent to which such turnover relates to articles of food or drink or both sold in a hotel, boarding house, restaurant, stall or any other place, the tax shall be calculated at the rate of four and a half pies for every rupee, if the turnover relating to those articles is not less than twenty-five thousand rupees".

By section 1 (2) of the amending Act the amendment effected by section 3 was to be deemed to have come into force on 1st August, 1949 the date on which the original Proviso was introduced into the section by Madras Act XV of 1949.

This will be the convenient stage to narrate the facts relating to the asessments in the three petitions now before me. The petitioner in W.P. No. 503 of 1957 is a hotel proprietor carrying on business in Tiruchirapalli. For the year 1953-1954 the Deputy Commercial Tax Officer determined his turnover at a certain figure and levied tax on that computed at 4½ pies in the rupee applying the Proviso to section 3 (1) as it then stood. This assessment was confirmed by the Commercial Tax Officer, Tiruchirapalli on appeal by the assessee. There was a further appeal by the petitioner to the Sales Tax Appellate Tribunal, and the Tribunal determined the turnover at a particular figure. But at the stage of the hearing and disposal of the appeal by the Appellate Tribunal, the decision of this Court to which I have already adverted had been rendered, and applying the principles there laid down the Tribunal reduced the rate of tax to 3 pies. This order of the Tribunal has become final and is even now in force. On the basis of this order of the Tribunal reducing the rate, the petitioner became entitled to a refund of Rs. 1,727-1-3, and this sum was refunded in September, 1956.

Madras Act XV of 1956 received the assent of the President on 1st October, 1956 and was published in the Fort St. George Gazette on 8th October, 1956. Thereafter the Deputy Commercial Tax Officer, Tiruchirapalli, issued a notice to the petitioner, requiring him to refund the sum of Rs. 1,727-1-3 which had been paid back to him in September, 1956 on the ground that by reason of the amendment effected retrospectively to the Proviso to section 3 (1) there had been a liability on the part of the petitioner to pay tax at the rate of 4½ pies and that the refund already made to him was consequently not due and had to be paid back. It is the validity of this demand that is challenged in this writ petition. The facts in the other two petitions are similar except as to the details of the amounts involved.

Before considering the submissions urged by the learned counsel on either side, it is necessary to set out the terms of section 17 of the amending Act, Madras Act XV of 1956. That section reads as follows :—

"(1) Notwithstanding anything contained in any judgment, decree or order of any Court, any tax levied or collected or purported to have been levied or collected under the Proviso to clause (*b*) of sub-section (1) of section 3 of the principal Act before it was amended by this Act shall be deemed to have been levied or collected, as the case may be, under the principal Act as amended by this Act as if this Act was in force at all relevant times.

(2) No suit or other proceeding shall be maintained or continued in any Court for the refund of any tax so paid ; and no Court shall enforce any decree or order directing the refund of any tax so paid".

The question for consideration is whether the State is entitled to require the petitioner to refund the amount which on the date when it was paid over was validly due to the petitioner under an order of the Appellate Tribunal which stands even now, in other words, whether the retention of the money by the petitioner has become unlawful by reason of the provisions contained in Madras Act XV of 1956 relevant portions of which have already been extracted.

I am clearly of the opinion that the demand for refund now made cannot be sustained on the terms of section 17. The relevant portion of the section is contained in sub-section (1), and under it the tax levied or collected is deemed to have been levied or collected validly. If, therefore, matters had stood at that stage, that is if assessment had been made at 4½ pies in the rupee but recovery proceedings had not taken place, any objection on the score of the constitutional invalidity of the Proviso to section 3 (1) would not have stood in the way of the recovery of the tax. Similarly if tax had been collected at the rate of 4½ pies before the date of the amending Act and the amount had been retained with the Government no proceedings either to

challenge the assessment or to question the legality of the retention of the amount collected would have been open to the asessee. But that is not the situation which is brought up for consideration in these petitions. As already pointed out when the excess over 3 pies per rupee was refunded to the petitioner, it was an amount lawfully due to him and was properly paid. The only question is whether the payment had become unlawful or could be deemed to have been made under a mistake of law. If *ex hypothesi* the refund was due—it was due because of the judgment of this Court upholding the objection to the validity of the charging provision—there could be no mistake in law in making the refund and the mere fact that the Proviso has been re-enacted with retrospective effect cannot have the effect of rendering the refund then made either illegal, unlawful or one under a mistake of law. If authority were needed for what I consider so obvious a proposition I might refer to the decision of Rajagopalan, J., in *Soundarapandian and Bros.* v. *Agricultural Income-tax Officer*[1]. I consider that the demand for the repayment of the amount refunded is not justified by law, and that the petitioners are entitled to the reliefs which they seek by these petitions.

The petitions are accordingly allowed and the rules *nisi* made absolute and the notices of demand quashed. No order as to costs.

V.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of the Trichy Srirangam Transport Co., (P.) Ltd. .. *Petitioner**

v.

The Industrial Tribunal, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947),—Tribunal under—Powers of—If governed by principles of Res judicata—*If could direct the introduction of a Provident Fund Scheme—Employees' Provident Fund Act (XIX of 1952)—If a bar to creation of other provident funds.*

*Madras Act (XII of 1949)—Section 6 validating certain awards—*Ultra vires *as it offends Article 14 of the Constitution.*

It is no doubt true that the Employees' Provident Fund Act enables only the Central Government to extend the application of the Act to certain establishments. But that does not mean that an Industrial Tribunal deciding a dispute under the Industrial Disputes Act could not direct the introduction of a provident fund for the workers in the establishment concerned in the dispute. Such a scheme will be outside the Employees' Provident Fund Act and may also differ in many respects from the fund created under the Act. It is no doubt true that the provisions of the Code of Civil Procedure relating to *res judicata* do not apply to the Tribunals under the Industrial Disputes Act. But the principle of *res judicata* is not peculiar to Civil Procedure Code and it would apply to all proceedings which involve adjudication of disputed rights. Adjudications that have become final cannot be reagitated even before an Industrial Tribunal. Whatever matter is referred to a Tribunal by the Government should be present before it and if any party fails to press any such claim they cannot be allowed to raise it again in relation to that period.

Section 6 of the Madras Act XII of 1949 validating certain awards is unconstitutional as offending against Article 14 of the Constitution. Moreover it has not the effect of reviving an award which has lapsed before the Act was passed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of Certiorari calling for the records in I.D. No. 6 of 1957 on the file of the Industrial Tribunal, Madras Respondent 1 herein and to quash the award dated 11th November, 1957 therein.

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1. (1957) 2 M.L.J. 434.

* W.P. No. 48 of 1958.

13th April, 1959.
23rd Chaitra—1881 Saka.

V. Tyagarajan and *P. V. Marthandam*, for Petitioner.

R. Ramasubba Ayyar, A. D. Sitaraman, B. R. Dolia and *V. S. Ramakrishnan*, for Respondents.

The Court made the following

ORDER.—The Trichy-Srirangam Transport Co. (P.) Limited runs a number of buses in and between the towns of Tiruchirapalli and Srirangam. The employees of this company are represented by two unions, one called the Trichy District Motor Workers' Union and the other called the General Workers' Union. Various disputes arose between the company and its employees, and, by an order which they made on 29th April, 1957 the Government of Madras referred them for adjudication to the Industrial Tribunal, Madras. The Tribunal pronounced its award on 11th November, 1957. The present petition has been filed by the company for the issue of an appropriate writ to quash the order of the Tribunal.

The Tribunal dealt with eight matters. The petition was argued before me only as regards five of these matters. The correctness of the award as regards items 1, 3 and 4 thereon has not been questioned. I need not, therefore, go into them.

Item 2 of the award dealt with the demand of the workers for the introduction of a provident fund scheme. In respect of that the Tribunal made this order:

"I therefore direct the Provident Fund Scheme to be introduced for the benefit of the employees of this Transport Company with effect from the 1st April, 1957; but the gratuity will be merged into that scheme, that is to say, whatever moneys are available to the employees under the Gratuity Scheme will be transferred to their respective credits under the Provident Fund Scheme. The contribution to the Provident Fund Scheme will be 6¼% of the basic wages and dearness allowance. The parties will file draft rules regarding the Provident Fund Scheme and those rules, after approval by the Tribunal, will be incorporated in this award. If the parties fail to do so within two weeks from this date, the Provident Fund Rules in force in A.B.T. Motor Transport, Pollachi will be adopted by this company with suitable modifications, wherever necessary".

The first criticism which Mr. Tyagarajan, the learned advocate for the company made in respect of these directions was that they are in excess of the powers and jurisdiction of the Tribunal: according to him the Tribunal has no authority to direct the introduction of a provident fund scheme. His argument was this. The earlier parts of sub-section (3) of section 1, of the Employees' Provident Funds Act, 1952 provides that subject to the provisions contained in section 16 it shall apply to every establishment which is a factory engaged in any industry specfied in Schedule I and in which fifty or more persons are employed.

The latter part of this sub-section empowers the Central Government to extend the provisions of the Act to any other establishment employing fifty or more persons. The position, therefore, is that the legislature has made the Act directly applicable to certain establishments. It has also given power to the Central Government to notify other establishments to which the Act may be extended. By implication no other authority has jurisdiction to extend the provisions of the Act to any establishment. To say that the Industrial Tribunal has power to make the provisions of the Act applicable to other establishments would be to confer on the Tribunal a power which the legislature entrusted exclusively to the Central Government.

It seems to me that there is a fallacy in this argument. No doubt it is only the Central Government which can direct that the provisions of the Act shall apply to establishments other than those referred to in the first part of sub-section (3) of section 1. But, it does not follow that the Tribunal cannot direct the introduction of a provident fund scheme independently of the Act. One illustration will make my meaning plain. Central Act LVIII of 1952 provides that Ministers shall be entitled without payment of rent to the use of a furnished residence. It also provides that the Ministers in occupation of such residences need not pay for electricity and water. It also provides that a Minister and the members of his family shall be entitled free of charge to accommodation in hospitals maintained by the Government and also to free medical treatment. The Act also provides that advances may be made to Ministers for the purchase of motor cars. Now, because such provisions are made in

respect of Ministers, it does not, as a matter of law or logic follow that a tribunal cannot direct that managements should provide free quarters for its employees and free light and free water. It does not follow that a Tribunal cannot direct that a management shall provide free medical tratement for its employees and the members of their families. It does not also follow that a Tribunal cannot direct that managements should make advances to their employees for the purchase of conveyances. Therefore, the circumstance that the Central Government is given power to direct that the provisions of the Employees' Provident Funds Act shall be extended to certain establishments does not preclude the industrial Tribunal from directing that a management should introduce a provident fund scheme.

There would however be important differences between provident fund schemes introduced in pursuance of the orders of an industrial Tribunal and provident fund schemes introduced in pursuance of the Employees' Provident Funds Act. The schemes under the Act would in certain respects stand in a favoured or protected position. They would be funds recognised for purposes of the Indian Income-tax Act. The amounts standing to the credit of any member of the fund would be protected from attachment under certain circumstances. The amounts standing to the credit of the fund would get priority in the event of the insolvency of the employer or the winding up of the company. Provident fund schemes introduced in pursuance of the orders of an Industrial Tribunal would not be entitled to these benefits.

Mr. Tyagarajan next argued that an industrial dispute between the same company and its employees arose in 1954 and that it was disposed of as I.D. No. 6 of 1954. At that time there was only a claim for gratuity and there was no claim for a provident fund scheme. Having accepted the gratuity scheme in 1954 the employees are now precluded from asking for a provident fund scheme.

I am unable to accept this contention either. The direction which the Tribunal gave in I.D. No. 6 of 1954 on this point was as follows :

" On a consideration of all the circumstances :

I find that gratuity should be paid to every worker at the rate of half month's wages for each year of service recokoned from the date of the worker joining the company subject to a maximum of twelve months wages, the said monthly wage being the highest pay last drawn by the worker at the time of termination of service by whatever cause."

This is not a matter to which the principles of *res judicata* can be made applicable. Nor is there any estoppel against the employees. That the Tribunal directed that the gratuity scheme should be merged with the provident fund scheme makes no difference. I am not, therfore, prepared to disturb the finding of the Tribunal in respect of this matter.

Item 5 in the order of the Tribunal was fixation of the scales of wages of all categories of workers. The Tribunal has fixed various scales of pay for various classes of employees and I was told that the scales it has fixed are the same as those which obtain in other establishments in the same district. There is no question of jurisdiction here, or of any error apparent on the face of the record. The decision of the Tribunal on this point cannot be disturbed.

I now go on to item 6 in the order of the Tribunal. In 1954 the company retrenched nine of its employees. At that time an industrial dispute was pending and so the company applied under section 33 of the Act for permission to effect the retrenchment. The Industrial Tribunal, Madurai, granted the permission sought for subject to certain conditions. One of these was that each of the persons retrenched should be paid by way of retrenchment relief the amount set out against his name. Another was that he should be given one month's notice or wages in lieu of notice. This was to be over and above the amount of retrenchment relief ordered to be paid. The company paid the amounts as directed by the Industrial Tribunal, Madurai. The workmen appealed against the order of retrenchment and complained that the amount of compensation was not in accordance with section 25-F of the Act. But that appeal was not admitted on the ground that it had been presented out of time.

The workers contended that the compensation ordered to be paid in 1954 was insufficient and that they should be paid retrenchment compensation in accordance with section 25-F of the Act. The Industrial Tribunal allowed this claim.

Mr. Tyagarajan contended that the order passed by the Industrial Tribunal in 1954 became final and that the workers are not therefore entitled to agitate the matter over again. The principle of *res judicata* applies to all proceedings which involve the adjudication of disputed rights, and, whether it was right or wrong the order made in 1954 was allowed to become final and it cannot be reopened now.

I agree with Mr. Tyagarajan that the principles of *res judicata* apply to these proceedings. But, I do not think that the argument would help him in the present case, and that is because the Industrial Tribunal, Madurai, when it directed the company to pay compensation on a certain basis had no jurisdiction to make such an order in the petition before it. The company's petition was for permission to retrench the workmen under section 33 of the Industrial Disputes Act. When such a petition was presented all that the Industrial Tribunal had power to do was either to grant the permission or refuse the permission. It had no power to attach any conditions to the permission. When, therefore, it directed that compensation should be paid to the retrenched workmen on a certain basis it was making an order which it had no jurisdiction to make. As the order made in 1954 was, therefore, an order made without jurisdiction, it is not one to which the principles of *res judicata* will apply.

I may here refer to the decision of the Supreme Court (unreported) in Civil Appeal No. 500 of 1957 (*Messrs. G. Mckenzie & Co., Ltd.* v. *Its Workmen and others*[1], where it is observed,

"As the purpose of section 33 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding under section 33 would not operate as *res judicata* and bar the raising of an industrial dispute."

Mr. Tyagarajan next contended on this point that the persons retrenched in 1954 were no longer workmen within the meaning of the definition in section 2 (*s*) of the Act and that therefore the question of compensation payable to them would not be an industrial dispute within the meaning of the Act.

The word "workman" in section 2 (*s*) is defined as including "any such person....whose dismissal, discharge or retrenchment has led to that dispute....."

The retrenchment of these nine individuals has raised this industrial dispute, *viz.*, that the amount is of the compensaion that should be paid to them. For the purpose of that dispute, the discharged workmen would continue to be workmen within the meaning of that definition. A retrenchment may produce an industrial dispute either because the workmen object to the retrenchment itself, or because they insist that the compensation paid is not adequtae. In either case it will be proper to say that the retrenchment has led to the industrial dispute, and so, it seems to me, the Tribunal was right in taking the view that it had jurisdiction in the matter.

Mr. Tyagarajan next contended that the matter is three years old and that there should be some end to matters of this kind. But then, no rule of limitation has been enacted by statute and it is therefore open to workmen to raise a dispute however stale or hoary their claim may have become. But, when there is delay in raising a dispute, an Industrial Tribunal would be exercising its jurisdiction wisely in taking that circumstance into account, and, in appropriate cases, refusing relief. That however is not a matter of jurisdiction. As the law stands it is only a matter of discretion. I cannot, therefore, interfere with the order of the Tribunal in this respect either.

Item 8 : In 1948 Mr. Venkataramiah passed an award which is generally called the Motor Transport Award. In accordance with the terms of that award the company framed Standing Orders under which its workmen were entitled to privilege leave for 17 days in addition to 7 days' festival leave and 7 days' sick leave. In July, 1950, the company cut down the privilege leave to one day for every 20 working days. They did so apparently under the impression that the provisions of the Factories Act applied to them. The employees raised an indu trial dispute, I.D. No. 6 of 1954 and the award passed on 7th June, 1954, directed

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1. *Since reported in* (1959) M.L.J. (Crl.) 461 : (1959) S.C.J. 670.

"that workshop workers also are entitled to 17 days privilege leave per annum, exclusive of 7 days' sick leave and 7 days' festival leave. The sick leave or festival leave shall not be allowed to be accumulated. The privilege leave of 17 days to which the workers are entitled shall be allowed to be accumulated only according to section 11 (*b*) of the Standing Orders."

The award, however, did not say anything in express terms as to the period between 5th July, 1950 and 7th July, 1954, when the award came into force. The employees raised the question that for that period the workers were entitled to 17 days' privilege leave. The Tribunal upheld the claim of the employees and passed an award accordingly.

Mr. Tyagarajan contended that here is a matter to which the principles of *res judicata* apply. The Tribunal observed:

"The labour disputes are not often governed by the strict provisions of the Code of Civil Procedure. It is open to the workmen to raise an Industrial Dispute in regard to every one of their greivances, or they can consolidate all their grievances in one single dispute. It was therefore open to them in the prior dispute to raise a demand only with reference to the future leave privilege; and in the present dispute the question is raised in regard to the years preceding the date of the coming into force of the award."

The Tribunal is certainly right in saying that the provisions of the Code of Civil Procedure do not in terms apply to labour disputes. But, the principles of *res judicata* are not peculiar to the Civil Procedure Code. In *Burn & Co.* v. *Their Employees*[1], Venkatarama Ayyar, J., observed as follows:

"That section (section 11, Civil Procedure Code) is, no doubt in terms inapplicable to the present matter, but the principle underlying it, expressed in the maxim "*interest rei publicae ut sit 'finis litium'*", is founded on sound public policy and is of universal application. (*Vide* Broom's Legal Maxims, Tenth edition, page 218). 'The rule of *res judicata* is dictated', observed Sir Lawrence Jenkins, C.J., in *Sheoparsan Singh* v. *Ramanandan Prasad Singh*[2], 'by a wisdom which is for all time.'

And there are good reasons why this principale should be applicable to decisions of Industrial Tribunal also. Legislation regulating the relation between Capital and Labour has two objects in view".

If the principles of *res judicata* apply to these proceedings it seems to me to be clear that whatever claims the workmen had in respect of privilege leave up to the time the Government made the reference in I.D. No. 6 of 1954 should have been pressed before the Tribunal, and, if they omitted to do that they cannot now be allowed to do it. In this view I quash the award of the Tribunal in respect of this item.

Item 7: This relates to fixation of the rate of increments to all the workers from the year 1953.

In order to understand the arguments advanced on this point it is necessary to mention certain facts. In 1948 Mr. Venkataramiah was appointed to adjudicate on various disputes then existing between the workers and the managements of certain motor transport services and motor transport workshops in the Province of Madras. His award took effect from 1st May, 1948, and, it would have ordinarily expired on 1st May, 1949. But, the order of reference which Government made was what has been described as an "omnibus" reference, that is to say, in the order of reference the Government did not particularise the disputes on which Mr. Venkataramiah was required to make his award: the reference was general in its terms. A similar "omnibus" reference was made to Mr. Ramayya Pantulu in respect of disputes in the engineering trades. On 17th September, 1948, Subba Rao, J., held that a reference of the kind that had been made to Mr. Ramaya Pantulu was incompetent and that he had no jurisdiction to enquire into disputes brought before him by workers in any particular firm in the engineering business. This decision was affirmed by a Bench of this Court in *Ramayya Pantulu* v. *Kutty and Rao.*[3] Thereupon the Legislature of the State of Madras passed Madras Act XII of 1949, seeking to validate awards that had not been actually quashed or set aside by the orders of this Court. Section 5 of that Act provided that all awards made by Tribunals to whom what I called "omnibus" references had been made shall be

1. (1957) S.C.J. 28 : 1956 S.C.R. 781 : A.I.R. 1957 S.C. 38.
2. (1916) 31 M.L.J. 77: L.R. 43 I.A. 91: I.L.R. 43 Cal. 694 : A.I.R. 1916 P.C. 78 (P.C.).
3. (1949) 1 M.L.J. 231.

deemed to be good and shall not be called in question on the ground that the Tribunal was not constituted in accordance with the provisions of the Industrial Disputes Act, or that the dispute was not referred to the Tribunal in accordance with the provisions of the Act. The second paragraph of the section, however, ran :

> " Nothing contained in this section shall be deemed to invalidate any decision or order of a Court which became final before the commencement of this Act."

Section 6 was in the following terms :

> " All awards passed by Industrial Tribunals and mentioned in the Schedule hereto which could not be enforced on account of the proceedings before the High Court, shall be current and valid for a further period of one year from the commencement of this Act."

In the Schedule to the Act was included the Motor Transport Award of Mr. Venkataramiah.

The validity of Madras Act XII of 1949 was considered by a Bench of this Court, in *Sarathy* v. *State of Madras*[1], and it was held that section 6 offended against Article 14 of the Constitution and was therefore void. This is what Govinda Menon, J., said on page 539 :

> " On this aspect of the case, our conclusion is that though at the time Act XII of 1949 was passed it could not have been held to be invalid on account of the discrimination contained therein, after 26th January, 1950, in view of Artilce 13 (1) of the Constitution which says that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this part shall to the extent of the contravention, be void, it has to be held that the legislation is inconsistent with Article 14, equality before law, and is therefore void."

The decision of the Bench on the main point was reversed by the Supreme Court in *State of Madras* v. *C. P. Sarqthy*[2], where the view was upheld that an ' omnibus ' reference was not bad. Their Lordships, however did not express any opinion on the validity or otherwise of section 6 of Madras Act XII of 1949.

The contentions of learned counsel on this part of the case covered very considerable ground. Dealing with one aspect of the matter Mr. Dolia, the learned Advocate for the workers, contended tha the award of Mr. Venkataramiah continued to be in force even in 1957. This is how he put his case. In its own right and strength the award of Mr. Venkataramiah was in force from 1st May, 1948 to 1st May, 1949. Section 6 of Madras Act XII of 1949 extended the currency and validity of that award for a period of one year from 10th June, 1949, the date of the commencement of the Act. So the award would have expired only on 10th June, 1950. Meantime Central Act XLVIII of 1950 introduced among other things sub-section (6) to section 19 of the Industrial Disputes Act. That sub-section runs :

> " Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award ".

The notice required by this sub-section has not been given. The award, therefore, continues to have effect.

Mr. Tyagarajan, on the other side contended, that section 6 of Madras Act XII of 1949 did not have the effect of reviving the award of Venkataramiah which had ceased to be effective from 1st May, 1949. Before section 6 of the Act can apply two conditions must be satisfied. One is that the award in question must be an award enumerated in the Schedule. That condition is no doubt satisfied in the present case. But, another condition also must be satisfied, and it is this : the award " could not be enforced on account of the proceedings before the High Court." There were no proceedings in the High Court or in respect of or in relation to the award passed by Mr. Venkataramiah. The second requirement of the section has not been satisfied. Therefore section 6 will not avail to extend the life of the award passed by Mr. Venkataramiah.

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1. (1951) 1 M.L.J. 527.
2. (1953) 1 M.L.J. 212 : (1953) S.C.J. 39 : 1953 S.C.R. 334 (S.C.).

To this it was replied that though there were no proceedings before the High Court in respect of the award which Mr. Venkataramiah had passed, there were proceedings before the High Court in respect of other awards made on similar omnibus reference and that the decision of the High Court in those proceedings made it impossible to enforce the award of Mr. Venkataramiah.

Now it may well be that the intention of those who wrote the words actually appearing in section 6 was to extend the life of awards which came within the mischief of the decision of Subba Rao, J., and of Horwill and Rajagopalan, JJ., in *Ramayya Pantulu* v. *Kutty and Rao*[1]. But the words actually used in the section—and a Court can only construe the words actually written into the Statute—appear to me to be more in accord with the interpretation which Mr. Tyagarajan invited me to put on them.

Mr. Tyagarajan next said that before Act XII of 1949 was passed the award of Mr. Venkataramiah had lapsed, and, if the intention of the Legislature had been to revise an award that had lapsed or expired, a different set of words should have been used. As it stands, the words " shall be current and valid for a further period of one year " postulate that the award continues to be current and valid. He pointed out, and I think quite properly, that the Legislature did not use words to the effect, " notwithstanding that any award has lapsed or expired." This argument too has force.

Mr. Tyagarajan finally pointed out that a Bench of this Court has observed that section 6 of Act XII of 1949 offends against Article 14 of the Constitution and that though the decision itself was reversed by the Supreme Court on other grounds, the observation on this point were not disapproved of. I must respect the view expressed by a Bench of this Court, and, in accordance with that view, I must hold that section 6 of Act XII of 1949 is bad.

Mr. Dolia, however, contended that even though an award may expire by efflux of time it does not follow that the award is wiped out altogether and the only thing is that its provisions cannot be enforced under the Industrial Disputes Act. But the rights and obligations which are created under the award can be enforced in proceedings in civil Courts. In this connection he referred to the decision in *Judhisthir Chandra* v. *Mukerjee*[2]. The relevant facts there were as follows. An award was passed on 25th May, 1948 which ceased to be effective after 25th May, 1949. The award in question had directed that dearness allowance at a certain rate should be paid. The employer then made representations to the Provincial Government that there had been material changes in the circumstances on which the award had been based and asked for a reference to a Tribunal and the Government made a reference. The Union contended that the Tribunal had no jurisdiction to adjudicate upon the issues raised. The Tribunal overruled the objection and decided that the

> " terms regarding the amount of dearness allowance and the payment of the same with retrospective effect as per award, dated 15th May, 1958, shall cease to be in operation and the award is amended and modified accordingly ".

The matter was taken to the High Court and it was contended on behalf of the workmen that since the award ceased to be effective after 25th May, 1949, there can be no modification of the award. The Court observed :

> " This contention, I do not think, is right. It overlooks the fact that though the award of 15th May, 1948, had become ineffective by the passing of time, the rights flowing therefrom have not been wiped out. The award directed payment of certain dearness allowance which, if not paid, created a debt in favour of the workmen, and it was a binding debt. The award binds the parties in the same way, as if the terms were agreed between them. In my view, the payment of this debt can be enforced by a civil suit."

A Bench of the Bombay High Court followed this case, in *Mangaldas. Narandas* v. *P. W. A.*[3]. It was contended in the Bombay High Court that the termination

1. (1949) 1 M.L.J. 231.
2. A.I.R. 1950 Cal. 577.
3. (1957) 2 L.L.J. 256.

of an award puts an end to all the rights and obligations created thereby and as a result of the termination of the award the obligation to pay remuneration at the rate prescribed thereby ceases. The Court repelled the contention. It observed :

> " In our judgment, the effect of termination of the award is only to prevent enforcement of the obligations under the award in the manner prescribed, but the rights and obligations which flow from the award are not wiped out. In taking that view we are supported by a judgment of the Calcutta High Court, in *Judhisthir Chandra* v. *Mukherjee*[1]."

In *Burn & Co* v. *Their Employees*[2], the Supreme Court also expressed the view that the termination of an award does not put an end to all the rights and obligations arising out of it. Venkatarama Ayyar, J., observed :

> " What then is the position ? Are we to hold that an award given on a matter in controversy between the parties after full hearing ceases to have any force if either of them repudiates it under section 19 (6), and that the Tribunal has no option, when the matter is again referred to it for adjudication, but to proceed to try it *de novo*, traverse the entire ground once again, and come to a fresh decision. That would be contrary to the well-recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be reagitated.
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> . . . .
>
> Now, if we are to hold that an adjudication loses its force when it is repudiated under section 19 (6) and that the whole controversy is at large, then the result would be that far from reconciling themselves to the award and settling down to work it, either party will treat it as a mere stage in the prosecution of a prolonged struggle, and far from bringing industrial peace, the awards would turn out to be but truces giving the parties breathing time before resuming hostile action with renewed vigour. On the other hand, if we are to regard them as intended to have long term operation and at the same time hold that they are liable to be modified by change in the circumstances on which they were based, both the purposes of the Legislature would be served."

But then, the problem still remains to what extent or for what purposes does an award which has expired by efflux of time or which has been terminated by notice survive. That question does not appear to have been so far decided. Probably, the answer would depend upon the circumstance of each case. The Supreme Court has recognised that an award which has ceased to exist either by notice or by efflux of time may be modified if circumstances so require. In this matter the Tribunal proceeded on the basis that the award which Mr. Venkataramiah passed in 1948 was in full force and effect. But in view of the decision of this Court that section 6 of Act XII of 1949 is *ultra vires* the Constitution, the footing on which the Tribunal proceeded would fail.

The position, therefore, is that the award of Mr. Venkataramiah which was in the field, lapsed by efflux of time. Circumstances now are certainly not the same as they were in 1948, when Mr. Venkataramiah made his award. What alteration should be made in the award by reason of changed circumstances is a question to which the Tribunal did not address itself since it took the view that the award of Mr. Venkataramiah continued to be in force. I understood Mr. Dolia to say that he had no objection to this issue being remitted to the Tribunal so that the matter may be decided afresh after taking evidence, Mr. Tyagarajan, however, pointed out that on 29th May, 1956, the Motor Transpor and General Workers' Union entered into an agreement with the Management in regard to the claims for increments on behalf of drivers and conductors, and, that the agreement is in force. It is a matter in controversy as to who the persons are who are bound by this agreement. That matter too the Tribunal will have to decide instead of leaving it to be adjudicated upon when the award of Mr. Venkataramiah is sought to be enforced. I would, therefore, quash the award of the Tribunal on this point on the ground that it proceeded on the erroneous view that the award of Mr. Venkataramiah was in force. It will be open to the Tribunal to take evidence on the question and give a fresh decision. When doing so it will have to pass suitable orders in respect of the persons bound by the settlement dated 29th May, 1956.

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1. A.I.R. 1950 Cal. 577.
2. (1957) S.C.J. 28 : (1956) S.C.R. 781 : A.I.R. 1957 S.C. 38.

In the result, the petition is dismissed except as regards items 7 and 8. The award of the Tribunal in regard to these two items is quashed. There will be no order as to costs.

R.M. — *Petition dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM, MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Mohan Ram (minor) through their guardian *ad-litem* and maternal uncle T. N. Rangachari and others .. *Appellants**

v.

T. L. Sundararamier and others .. *Respondents.*

Civil Procedure Code (V of 1908), *sections* 11 *and* 47—*Powers of executing Court—Decree directing sale of inalienable land like service inams—If could be questioned at the time of execution.*

It is generally true that an executing Court cannot go behind the decree. But there are certain well recognised exceptions to this rule. Where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale. Where the executing Court is satisfied that the lands sought to be sold in execution of a decree are service inam lands and are therefore not saleable, it can refuse to execute the decree.

Adinarayana v. *Chengiah*, A.I.R. 1937 Mad. 918, followed.

Venkataseshayya v. *Virayya*, (1957) 2 An. W.R. 137 (F.B.), differed from.

But to enable an executing Court to refuse to execute such a decree there should be some material either in the plaint or written statement or issues or judgment which when looked into could enable the Court to conclude that the land sought to be sold is an inalienable service inam.

Per *Anantanarayanan, J.*—" The rule of estoppel or constructive *res judicata* which would prevent the inamdar or his successors in title from agitating the matter of inalienability in execution proceedings is upon the plane of principle. The power of the executing Court to go behind the decree, because it is opposed to public policy or offends a statutory prohibition, is upon another plane altogether. While no executing Court can launch into a fresh trial because of mere allegations or further new material claimed to be available, if materials on the same footing as the decree itself and equally evident and indisputable are available on record to show that the land sought to be sold is inalienable, the Court can go behind the decree in such instances ".

Appeal against the Order of the District Court of Madurai, dated 13th September, 1957 and made in E.A. No. 132 of 1957, in E.P. No. 12 of 1956, in O. S. No. 21 of 1950.

K. S. Champakesa Ayyangar and *K. C. Srinivasan*, for Appellants.

O. K. Ramalingam, K. S. Ramamurthi, T. R. Mani and *T. P. Gopalakrishnan*, for Respondents.

When the appeal first came on for hearing the following order was made by

Ramaswami, J.—This appeal is against the order made by the learned District Judge of Madurai, in E.A. No. 132 of 1957, in E.P. No. 12 of 1956, in O.S. No. 21 of 1950.

The disputed property is 2 cents of land in the heart of Madurai town and forming part of T. S. No. 1522. It is Devadhyam land granted for the Kalanji Service (supply of betel, etc., in a silver or gold cup during Palliyarai Pooja and Navarathri) in Sri Meenakshi Sundareswarar Temple. It is common ground that a valuable building has been constructed upon it.

These two cents of land came into the possession of G.G. Kuppuswami Ayyar under several alienations with which we are not concerned here. This G. G. Kuppu-

* A.A.O. No. 272 of 1957.

6th April, 1960
(17th Chaitra, 1882—Saka.)

swami Ayyar mortgaged this property to the Vasantha Chit Fund, the original decree-holder. This mortgage was the subject-matter of the suit O.S. No. 21 of 1950. This suit resulted in a decree. The hypotheca was brought to sale. It was put up in auction in E.P. No. 12 of 1956 on 28th January, 1957 and the property was purchased by T. S. Krishnan for Rs. 13,410/. The sale was confirmed after overruling the objections raised by Kuppuswami Ayyar and his son and the present appeal is by the son against that order.

Delivery of possession has not yet taken place.

The contraversy before me is an interesting one and raises an important question of law.

That the property in question is Devadhyam land and service Inam granted for the purpose of a particular service in Sri Meenakshi Sundareswarar Temple at Madurai, can be assumed as established. It is now well-settled that lands forming the emoluments of offices of a public nature cannot be alienated by the holder by way of sale, gift or mortgage or sold in execution of a decree against him. This has been recognised as a rule of general law based upon public policy in connection with Inams granted for service in the following cases: *Lakshmanaswamy Naidu* v. *Rangamma*[1]; *Anjaneyulu* v. *Sri Venugopal Rice Mills Ltd., Tenali*[2], *Sundararaja Dikshitulu* v. *Seshadri Dikshitulu*[3], *Ramanathan Chettiar* v. *Kalidasa Kavundan*[4]; *Adinarayana Chetty* v. *Chengiah*[5]; *Ramakrishnamma* v. *Venkatasubbiah*[6], *Lakshmadu* v. *Ramudu*[7], and *Kottayya* v. *Subbrayudu*[8]. The principle is that if there is dissociation of the office from the emoluments attached thereto, such dissociation impairs the efficiency of the service to be rendered. Therefore, it is held that it is contrary to public policy and such alienations are void.

It is well-known, however, that many of these service inam holders alienate these properties without reference to their obligations and do not set up the inalienability for reasons of their own during the course of the trial or before the confirmation of the sale. In other words, the alienor and the alienee for ulterior objects of their own and to the detriment of the trust, might be discreetly silent regarding the inalienability of the property in question, so that the Court might proceed to grant the decree.

Then this interesting question arises. What happens if the inalienability is set up in the executing Court after the decree has been passed ? Is that Court competent to go into that question in order to come to the conclusion that it cannot execute the decree or would it be a case of that Court being prevented from doing so by the equally well-settled principle that the executing Court cannot question the decree which it is asked to execute.

In *Venkataseshayya* v. *Virayya*[9], Viswanatha Sastri, J., in his order of reference to the Full Bench reviewed all the Madras cases and came to the conclusion :

> " I humbly venture to think that where the alienation of service inam lands is prohibited on grounds of public policy, either under the general law or by statute, the position is the same and in either case it is the duty of the executing Court on being satisfied that the lands are service inams and therefore not saleable, to stay its hand. I find it difficult to accept the view that the want of jurisdiction of the Court to direct a sale of the land on the ground of its being a service inam must appear on the face of the decree. Courts seldom pass decrees reciting therein their incompetency or facts showing it".

In fact though there is a Bench decision of this Court to the contrary in *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[10], there are other decisions of this Court which have held that the executing Court can hold its hand if it finds that the sale is a nullity. The learned Judge (Viswanatha Sastri, J.) mentioned the decisions of this Court. Venkataramana Rao, J., in *Adinarayana v. Chengiah*[5], was of the opinion that where alienation of service inam lands is prohibited on grounds of public policy, either by a

1. (1902) I.L.R. 26 Mad. 31.
2. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 at 624 (F.B.).
3. (1927) 54 M.L.J. 76.
4. (1936) 71 M.L.J. 398.
5. A.I.R. 1937 Mad. 918.
6. (1934) 68 M.L.J. 46.
7. I.L.R. (1940) Mad. 123.
8. (1956) An. W.R. 739.
9. (1957) 2 An. W.R. 137 (F.B.).
10. (1936) 71 M.L.J. 867.

statute or under the general law, the executing Court can inquire into the matter and refuse to execute a decree which directs such sale. In other words, there are decisions of this Court which are also of the view that where it becomes apparent even after the confirmation of sale that the sale is one which could not have been held that is a nullity, it could stay its hand.

The attention of the learned Judge (Viswantha Sastri, J.) was also drawn to other decisions holding the contrary view. Therefore, he had the matter placed before a Full Bench of the Andhra High Court. The Full Bench in *Venkataseshayya* v. *Virayya*[1], on grounds which it is unnecessary to re-set here, came to the conclusion that on the principle of *res judicata* the agitation of that question would be barred.

The present position may be summed up as follows: *viz.*, that one line of decisions is to the effect that it is open to have this question of inalienability of the inam lands and the void sale being examined even after the decree is passed by the executing Court ; and there is another line of decisions which holds that the decree precludes the executing Court from going behind the decree, however void that sale may be. The line of decisions emphasises the principle that an executing Court can never go behind the decree.

This is a matter which is coming up often before this Court and is one of practical importance. It is but necessary that this should be set at rest by being considered by a Full Bench of this Court.

The following two questions may be referred to the Full Bench :

(1) Whether, when service inam lands have been sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their saleability under section 35 of Madras Act XIX of 1951, it is open to the Inamdar or his successors-in-title to treat the Court sale as null and void and seek to recover possession of the lands from the purchaser at the Court sale or resist the claims of the purchaser to be put in possession of the lands ?

(2) Whether sections 11 and 47 of the Civil Procedure Code are a bar to the maintainability of the objection?

The papers are directed to be placed before my Lord the Chief Justice for such action as my Lord deems fit. The entire case may also be disposed of by the Full Bench.

[The Case then came on for hearing before a Full Bench (*Somasundaram, Ramaswami* and *Anantanarayanan, JJ.*)].

The Court delivered the following opinion*:

Ramaswami, J.—This Full Bench has been constituted on a reference made by one of us in the following circumstances :

The disputed property is 2 cents of land in the heart of Madurai Town and forming part of T. S. No. 1522. It is stated to be Devadhayam land granted for the Kalanji Service (supply of betels, etc., in a silver or gold cup during Palliyarai Pooja and Navarathri) in Sri Menkashi Sundareswarar Temple. It is common ground that a valuable building has been constructed on it. We have to point out at the very outset that in the earlier proceedings of O.S. No. 21 of 1950 this *character* of the land never came to light—*vide* plaint, written statement issues and judgment therein. It is only in the subsequent execution stage just before confirmation of sale that documents have been filed for showing that these two cents are service inam.

These two cents of land came int the possession of G. G. Kuppuswami Ayyar under several alienations with which we are not concerned here. G. G. Kuppuswami Ayyar mortgaged the property to the Vasantha Chit Fund, the original decree-holder in O.S. No. 21 of 1950, which was a suit to enforce the mortgage. The suit resulted in a decree. The hypotheca was brought to sale. It was put up in auction in E.P. No. 12 of 1956 on 28th January, 1957, and the property was purchased by T. S. Krishnan for Rs. 13,410. The sale was confirmed after overruling the objections

1. (1957) 2 An.W.R. 137 (F.B.).

* 15th March, 1960.

raised by Kuppuswami Ayyar and his son in E.A. No. 132 of 1957 filed under the provisions of section 47 and Order 21, rule 90, Civil Procedure Code. The present appeal, C.M.A. No. 272 of 1957 is preferred by the son of Kuppuswami Ayyar against that order.

Delivery of possession has not yet taken place.

The learned District Judge following the Full Bench decision of the Andhra Pradesh High Court in *Venkataseshayya* v. *Virayya*[1], held that if in the suit or at the execution stage, the question of the alienability of the property is not raised by the judgment-debtors, they would be precluded by the rule of constructive *res judicata* from later on raising that question. Therefore he dismissed the application for setting aside the sale.

The controversy arising from the appeal posed an important question of law.

That the property in question is *devadayam* land and service inam granted for the purpose of a particular service in Sri Meenakshi Sundareswarar Temple at Madurai, can be assumed for the purpose of this reference as established, though naturally we can make no final pronouncement on it. It is now well-settled that lands forming the emoluments of offices of a public nature cannot be alienated by the holder by way of sale, gift or mortgage or sold in execution of a decree against him. This has been recognised as a rule of general law based upon public policy in connection with inams granted for service in the following cases: *Lakshmanaswamy Naidu* v. *Rangamma*[2], *Anjaneyalu* v. *Sri Venugopal Rice Mills, Ltd., Tenali*[3], *Sundararaja Dikshitulu* v. *Seshadri Dikshitulu*[4], *Ramanathan Chettiar* v. *Kalidasa Kavundan*[5], *Adinarayana Chetty* v. *Chengiah*[6], *Ramakrishnamma* v. *Venkatasubbiah*[7], *Lakshmudu* v. *Ramudu*[8] and *Kotayya* v. *Subbarayudu*[9]. The principle is that if there is disassociation of the office from the emoluments attached thereto, such dissassociation impairs the efficiency of the service to be rendered. Therefore, it is held that it is contrary to public policy and such alienations are void.

It is well-known however that many of these service inam-holders alienate the properties without reference to their obligations and do not set up the inalienability for reasons of their own during the course of the trial or before the confirmation of the sale. In other words, the alienor and the alienee for ulterior objects of their own and to the detriment of the trust, are discreetly silent regarding the inalienability of the property in question, so that the Court might proceed to grant the decree.

Then this interesting question arises. What happens if the inalienability is set up in the executing Court after the decree has been passed ? Is that Court competent to go into that question in order to come to the conclusion that it cannot execute the decree or would it be a case of that Court being prevented from doing so by the equally well-settled principle that the executing Court cannot question the decree which it is asked to execute ?

There are two lines of decisions in regard to this point of law raised, one line of decisions holding that it is the duty of the executing Court *on being satisfied* that the lands are service inam and therefore not alienable, to stay its hand and another line of decisions holding that the decree precludes the executing Court from going behind the decree however void that the sale in pursuance of the decree may be. That line of decisions emphasise that an executing Court can never go behind the decree.

Inasmuch as this is a matter which is coming up before this Court often, and is one of practical importance the following two questions have been referred to the Full Bench:

> Whether, when service inam lands have been sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their saleability under section 35 of the

1. (1957) 2 An. W.R. 137 (F.B.).
2. (1902) I.L.R. 26 Mad. 31.
3. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).
4. (1927) 54 M.L.J. 76.
5. (1936) 71 M.L.J. 398.
6. A.I.R. 1937 Mad. 918.
7. (1934) 68 M.L.J. 46.
8. I.L.R. (1940) Mad. 123.
9. (1956) An.W.R. 739.

Madras Act XIX of 1951, it is open to the Inamdar or his successor-in-title to treat the Court sale as null and void and seek to recover possession of the lands from the purchaser at the Court sale or resist the claims of the purchaser, to be put in possession of the lands ?

Whether sections 11 and 47 of the Civil Procedure Code are a bar to the maintainability of the objection ?

Before entering into an examination of the two lines of decisions, we wish to make it clear that we have confined ourselves to answering the substance of the reference, *viz.*, whether it is open to the executing Court on being satisfied, that the lands are service inam lands and therefore not saleable, to stay its hand. In regard to the merits of the instant case on our answering this reference, the appeal will go back to the single Judge for disposal.

In *Lakshmanaswami Naidu* v. *Rangamma*[1], decided by a Bench of this Court consisting of Davies and Benson, JJ., it was held that notwithstanding the fact that a compromise decree has been passed directing the sale of an inalienable office, the executing Court has jurisdiction to go behind the decree and refuse to execute it, since by section 375 of the Code of Civil Procedure the Court has no jurisdiction to pass a decree on a compromise unless it was a lawful compromise and any terms of a contract which are opposed to public policy are invalid and will not therefore be enforced by the Courts, and so far as a decree embodies unlawful terms of a compromise it is inoperative and will not be enforced.

In *Raja of Vizianagaram* v. *Dantivada Chelliah*[2], which related to sale of service inam land on the foot of a mortgage decree, it was argued that as between the parties to the decree the order for sale therein contained must be carried out notwithstanding the prohibition by law. But this argument was repelled on the ground that the decree directing the sale of such lands is *ultra vires* and the prohibition in question based upon public policy must be taken to be absolute, and deprive the civil Courts of Jurisdiction to give directions for sale of such inam property.

In *Anjaneyalu* v. *Sri Venugopala Rice Mills, Ltd.*[3], a Full Bench of this Court held that lands held on *swastivachakam* service tenure are not subject to attachment in execution of a decree, as the sale of such lands was opposed to public policy and the nature of the interest affected.

It is unnecessary to examine the other decisions because in *Adinarayana* v. *Chengiah*[4], Venkataramana Rao, J., has examined the entire case-law and has formulated the following propositions and which, if we may say so respectfully, cannot be bettered, *viz.*, that there is an exception to the application of the general rule as to jurisdiction of the executing Court to go behind the decree ; where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute the decree which directs such a sale ; and that a distinction should not be drawn between the cases where the prohibition appears on the face of the decree and cases where evidence will have to be taken to ascertain it, and it is the duty of the Court to entertain the objection and determine the same if necessary by taking evidence. It must be borne in mind that *Adinarayana* v. *Chengiah*[4], was a case where the question raised was whether it was open to a party who had been added as the legal representative of the deceased mortgagor defendant to resist the passing of a final decree on the ground that the mortgaged property being an *acharyapurusha* service inam is inalienable and the sale of such property would be illegal on grounds of public policy. Venkataramana Rao, J., held that the doctrine that an executing Court cannot go behind the decree would not be applicable to a case where objection is taken at the stage of passing the final decree in the mortgage suit, as until the final decree is passed in a mortgage suit, there is no executable decree and the suit must be deemed to be still pending and the application for final decree is not an application for execution.

1. (1902) I.L.R. 26 Mad. 31.
2. (1904) 14 M.L.J. 468 : I.L.R. 28 Mad. 84.
3. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).
4. A.I.R. 1937 Mad. 918.

In *Ramakrishnamma* v. *Venkatasubbiah*[1], where a Dasabhandam inam was sold in execution of a decree against the inamdar, it was held by a Division Bench that as the land was inalienable it could not have been validly sold in execution. Though the facts are not fully reported, it appears that the validity of the sale came in question in a suit by the purchaser for possession which the Inamdar successfully resisted. In *Lakshmadu* v. *Ramudu*[2], another Division Bench held that a sale of Dasabhandam inam lands held and confirmed in execution of a mortgage decree obtained against the Inamdar was a nullity and could be disregarded by the Inamdar's legal representatives though they were parties to the execution proceedings. This case was also a suit for recovery of possession.

Turning to the other line of decisions of this Court, they are *Somasundaram* v. *Kondayya*[3], followed by King, J., *Venkatappadu* v. *Appalaswami*[4], and by Madhavan Nair, J., in *Bullayya* v. *Subbayya*[5]. The reasoning of the learned Judges is found in the judgment of Venkatasubba Row, J., in *Somasundaram* v. *Kondayya*[6].

"We are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant (the holder of the service inam) to be permitted to plead that the land was inalienable at the time of the Court sale ? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold".

To these decisions may be added *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[7]. It was a case of a mortgage decree for the sale of temple service inam lands, whose alienation, though not prohibited by statute, was opposed to public policy according to the uniform course of decisions in Madras. Burn and Lakhmana Rao, JJ., held reversing Pandrang Row, J., and agreeing with an earlier decision of Pakenham Walsh, J., in *Ranga Iyer* v. *Sundararaja Iyengar*[8], that the executing Court could not go behind the decree and entertain an objection to its validity but must execute the decree as it stood. The learned Judges rested their decision on these grounds : (1) There was no want of jurisdiction in the Court which passed the decree apparent on its face. (2) The prohibition against alienation was not statutory. (3) The executing Court had no power to go into disputed questions of fact, which, if proved, would take away the jurisdiction of the Court which passed the decree to order sale. The learned Judges were evidently prepared to make an exception where the decree for sale contravened a statutory prohibition like section 5 of the Madras Act III of 1895 or section 6 of Madras Act II of 1904, for it was on this ground that they distinguished *Raja of Vizianagaram* v. *Dantivada Chelliah*[9], and *Raja of Kalahasti* v. *Venkatadri Rao*[10].

It will thus be seen that *Somsundaram* v. *Kondayya*[6], and the other decisions relied upon the bar of *res judicata* as precluding the judgment-debtor from pleading that the land was inalienable in subsequent proceedings. In regard to *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[7], we also venture to think with Viswanatha Sastri, J., to whose order reference will be made presently, that where the alienation of service inam lands is prohibited on grounds of public policy, either under the general law or by statute, the position is the same and in either case it is the duty of the executing Court on being satisfied that the lands are service inam lands and therefore not saleable to stay its hand.

This was the position of the case-law so far as this Court is concerned when the Andhra Pradesh High Court dealt with a controversy of this nature in *Venkataseshayya* v. *Virayya*[11]. In that case the suit was brought for a permanent injunction restraining the defendants from interfering with the possession and enjoyment of certain carpenter service inam lands held by the family of plaintiffs 1 to 3. The lands were mortgaged by the plaintiffs to the first defendant who filed a suit on the mortgage, obtained a

1. (1934) 68 M.L.J. 46.
2. I.L.R. 1940 Mad. 123.
3. (1925) 49 M.L.J. 401.
4. (1940) 2 M.L.J. 487.
5. A.I.R. 1933 Mad. 130.
6. (1925) 49 M.L.J. 401.
7. (1936) 71 M.L.J. 867.
8. (1933) 37 L.W. 358.
9. (1904) 14 M.L.J. 468: I.L.R. 28 Mad. 84.
10. (1927) 53 M.L.J. 533 : I.L.R. 50 Mad. 897.
11. (1957) 2 An.W.R. 137.

decree for sale and had the lands sold through Court at an auction sale at which he was the purchaser. Thereafter he sold the lands to the second defendant on whose contest the suit was dismissed as being barred by *res judicata*. There was a second appeal which came before Viswanatha Sastri, J., in the first instance. The learned Judge assembled all the relevant cases and indicated his own respectful agreement with opinion of Venkataramana Rao, J., in *Adinarayana* v. *Chengiah*[1], that where the alienation of service inam lands is prohibited on grounds of public policy either under the general law or by statute, the executing Court enquiring into the matter should refuse to execute the decree which directs such a sale, and expressed his disagreement with *Srirangachariar* v. *Annamalai Chettiar*[2], which held that if it is admitted in the course of the execution proceedings that the land directed to be sold by the decree are service inam lands the executing Court cannot proceed to sell the lands but if this fact is disputed the executing Court is incompetent to hold an enquiry to find out the truth. Therefore, Viswanatha Sastri, J., finding that there has been a difference of judicial opinion on the question whether when service inam lands are sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their saleability by reason of the prohibition contained in section 5 of Madras Act III of 1895, it was open to the Inamdar to treat the Court sale as null and void and recover possession of the lands from the purchaser at the Court sale or resist the claim of the purchaser to be put in possession of the lands. He therefore directed the papers to be placed before the learned Chief Justice for posting the case before a Division Bench.

The Second Appeal came up before Subba Rao, C.J., and Bhimasankaram, J. and they formulated the two questions as in the instant case and referred the matter to a Full Bench. The Full Bench consisting of Subba Rao, C.J., and Satyanarayana Raju and Mohd. Ahmed Ansari, JJ., held that when the decree was made the Court must be deemed to have decided that the said property was alienable property and therefore the said decree would operate as res *res judicata* in a subsequent suit and that the question raised by the plaintiffs-appellants that the lands sold in execution are inalienable service inam lands does not relate to the execution of the decree for it attacks the decree itself on the ground that it is void and as such an independent suit will lie.

"The doctrine of *res judicata*" literally meaning the matter that has been decided and sometimes expresses as " *res judicata* " a singular and not a plural term as has been pointed out in Hukum Chand's (T.L.L.) Treatise on the Law of *Res judicata* including the Doctrines of Jurisdiction, Bar by suit and *Lis pendens*, 1894,

> " is of universal application, and, in fact, a fundamental concept in the organization of every jural society. Justice requires that every cause should be once fairly tried, and public tranquillity demands that having been tried once, all litigation about that cause should be concluded for ever between those parties. The maintenance of public order, the repose of society, and the quiet of families, requires that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. If it were not for the conclusive effect of all such determinations there would be no end of litigation and no security for any person, the rights of parties would be involved in endless confusion, and great injustice often done under cover of law ; while the Courts, stripped of their most efficient powers, would become little more than advisory bodies ; and thus the most important function of the Government—that of ascertaining and enforcing the rights—would go unfulfilled ".

The term " *res judicata* " is derived from the Roman Law, and in its most obvious and general meaning, it signified at Rome, as it signifies in England and in America, that a matter in dispute had been considered and settled by a competent Court of Justice. It is based upon the twin principles of

> " Every judgment was allowed a conclusive effect on the ground *res judicata proveritate accipitur* : (a matter adjudicated is taken for truth) and so conclusive was the effect of it that it was said *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum* ".

1. A.I.R. 1937 Mad. 918. 2. (1935) 41 L.W. 485.

The doctrine of *res judicata* was also more immediately based on the equally well-known maxim "*nemo debit bis vexari pro unra et eadem causa.*"

These maxims based on public interest and private convenience are enshrined in the jurisprudence of every civilised country to-day—*interest rei bulicae ut sit finis litium* —otherwise great oppressions might be done under colour and pretence of law. (Halsbury's Laws of England, Simonds edition. Volume. 15, page 184 and foll. Words and Phrases, Permanent edition, Vol. 37 (1658 to date) (West Publishing Co., St. Paul Minx U.S.A.) page 612 and foll.; Corpus Juris Secundum, Volume 31 (The American Law Book Co., N. Y.) page 186 and foll. ; volume 77 page 274 and foll.)

The substance of the rule as enunciated and recognised in England was approved and acted upon in India in numerous cases by the Judges and imported almost *res integra* in this country long before the enactment of a complete Code of Civil Procedure in India and embodied in section 11.

Res judicata is a form of estoppel and under English Law, section 11, would correspond to estoppel by record. But *res judicata* differs from estoppel by conduct in essential particulars. The former results from a decision of the Court, and based on public policy ousts the jurisdiction of the Court, and presumes conclusively the truth of the former decision. The latter results from acts of parties and is based on equity, and formulates only a rule of evidence and prevents a person from setting up what he calls the truth. It is a well-settled principle that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold to approbate and reprobate, to the detriment of his opponent; and wholesome rule applies not only to the successive stages of the same suit but also to those suits which grow out of the judgment in the first suit; see the A.I.R. Commentaries on the Code of Civil Procedure, 6th edition (1957), Volume 1, page 281 ; Bigelow 783 ; *Mahadev Singh*[1], *Hemanta Kumari Devi* v. *Prasannakumar Datta*[2], *Chidambargauda* v. *Channappa*[3], *Shama Bai* v. *Purushothamdass*[4]. It is interesting that in the Dharma Sastra Prannaya or Purvanyaya (*res judicata*) was a complete answer. It could proceed through the King, Judge, the Scribe or one of the Sabhyas as to what was said and decided. (P. V. Kane's History of Dharmasastra, Volume III, page 332, etc.) The rule of constructive *res judicata* embodied in *Explanation* IV to section 11, Civil Procedure Code was enforced : (*Ibid*) page 306 ; Kat. 221 (q. by Mit. on Yag. 11. 80 and V.P. p. 80).

On this principle of finality of proceedings, we have evolved the ancillary principle that it is against public policy and good sense alike that the Court charged with the execution of a decree a proceeding collateral to the judgment should be allowed to question its validity : *vide* the observations of Page, C.J., in *S. A. Nathan* v. *S. R. Samson*[5]. See also *Jai Narain* v. *Kedar Nath*[6]. This principle is embodied also in a series of decisions of this Court. It is enough to cite *Govindan Nadar* v. *Natesa Pillai*[7] which holds that the executing Court must take the decree on its face, *Ranga Ayyar* v. *Sundararaja Ayyangar*[8] which holds that the executing Court cannot go into controversial questions, *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[9], wherein it has been held that the power of the executing Court to go behind the decree should be circumscribed within the minimum possible limits and *Commissioner of Income-tax, Madras* v. *Salem District Urban Bank. Ltd.*[10], wherein it has been held that the Court should be very chary of recognising fresh exceptions. These are all based upon the principle laid down in *Somasundaram* v. *Kondayya*[11], that in the sale of unenfranchised inam land in execution of money decree the real question is not what the true facts are but what the result of certain proceedings is, fructifying into a decree. This principle of *res judicata* which is a cardinal principle of all legal systems of most civilised

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1. A.I.R. 1931 Oudh 123.
2. (1928) I.L.R. 56 Cal. 584 : A.I.R. 1930 Cal. 32.
3. A.I.R. 1934 Bom. 329.
4. A.I.R. 1925 Mad. 645.
5. I.L.R. (1931) 9 Rang. 480 (F.B.).
6. (1956) 1 M.L.J. (S.C.) 151 : (1956) S.C.J. 301 : A.I.R. 1956 S.C. 359 : 1956 S.C.R. 62.
7. (1931) 61 M.L.J. 520: A.I.R. 1932 Mad. 7.
8. A.I.R. 1933 Mad. 359.
9. I.L.R. (1937) Mad. 329.
10. I.L R. (1940) Mad. 628.
11. (1925) 49 M.L.J. 401.

countries and which has been described as the most salutary cannot prevail as the long line of Madras decisions referred to above show, to the extent of compelling the executing Court to sell inalienable service inam lands prohibited on grounds of public policy either by statute or under the general law.* It will be rememberd how Burn and Lakshmana Rao, JJ., in *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[1] appear to hold that if it is admitted in the course of the execution proceedings that the lands directed to be sold by the decree are service inam lands, the executing Court cannot proceed to sell the lands but if this fact is disputed the executing Court is incompetent to hold an enquiry to find the truth. But like Viswanatha Sastri, J., we are in respectful agreement with the opinion of Venkataramana Rao, J., in *Adinarayana* v. *Chengiah*[2], that where the alienation of service inam lands is prohibited on grounds of public policy, either by a statute or under the general law, the executing Court on being satisfied that the lands are service inam lands and therefore not saleable should stay its hand. To this extent we respectfully differ from the Full Bench decision in *Venkataseshayya* v. *Virayya*[3].

The final point for determination is as to what constitutes 'satisfaction' referred to above. Several decisions have been emphasising that it is only when the decree appears to be void on the face of the record the execting Court can go behind the decree and enquire. It need not be pointed out that it is an elementary principle of law that every Court has got jurisdiction or not. But as Viswanatha Sastri, J., has rather caustically pointed out :

> "I find it difficult to accept the view that the want of jurisdiction of the Court to direct a sale of the land on the ground of its being a service inam must appear on the face of the decree. Courts seldom pass decrees reciting therein their incompetency or facts showing it."

But at the same time though in most of the cases cited by Viswanatha Sastri, J., in his order of reference, the decree for sale, preliminary or final, did not contain within itself anything to show that the land was inalienable and yet it was held that the Court had no power to order the sale, we are of opinion in accordance with the decisions to which we shall now refer that when either the plaint, or written statement, or issues or judgment, when looked into should contain some materials for concluding that the land sought to be sold through Court is inalienable service inam land. Otherwise we would be practically engrafting on the execution stage a totally different suit which does not arise at all from the old suit. In *Meenakshi Ammal* v. *Chidambaram Chettiar*[4], it was held that the objection that the property cannot be sold in execution being service inam land should be clear from the plaint and the judgment. In *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[1], it was held that when the fact of inalienability is denied and that allegation is not made out *ex facie* it is not open to the executing Court to launch an enquiry into the plea of inalienability. In *Sham Sunder Singh* v. *Dhirendra Nath*[5], and *Chintamani* v. *Zahiruddin*,[6] it has been been held that the question must appear on the face of the record and should not involve an investigation of absolutely fresh facts. In other words, the executing Court can go into the inalienability character of the service inam lands and their unsaleability only if the plaint, or written statement, or issues or judgment, etc., which we may legitimately look into disclose inalienability of the inam.

Thus, we can reconcile the two great principles based upon public policy, *viz.*, execution of the decrees which are shown to be nullities and the principle of *res judicata*, in the immutable interests of truth and justice.

This reference is answered accordingly.

Anantanarayanan, J.—I have had the advantage of study of the judgment of my learned brother, Ramaswami, J. Since I am in entire agrement with his conclu-

* For similar decision of the High Courts see *Bai Suraj* v. *Hari Bai Mosa Bhai*, A.I.R. 1943 Bom. 54 (Execution in Contravention of Bhagdari, etc. Act) ; *Katwari* v. *Sita Ram Tevari*, A.I.R. 1921 All. 118 (Section 20 of Agra Tenancy Act) ; *Chintamani* v. *Zahiruddin*, A.I.R. 1956 Pat. 57 (Sale prohibited by section 47 of Chota Nagpur Tenancy Act).

1. (1936) 71 M.L.J. 867.
2. A.I.R. 1937 Mad. 918.
3. (1957) 2 An.W.R. 137 (F.B.).
4. (1947) 1 M.L.J. 66 : A.I.R. 1947 Mad. 341.
5. A.I.R. 1950 Pat. 465.
6. A.I.R. 1956 Pat. 57.

sions, and the manner in which he has propounded the answers to the two questions referred to us, it might not seem necessary that I should add my own observations. But I am impelled to do so, for the reason that we are not merely faced with a problem of some intricacy and importance, but also with what appeared to be two opposing streams of case-law as far as this Court is concerned. Further the Full Bench decision of the Andhra High Court in *Venkataseshayya* v. *Veerayya*[1], is entitled to our very great respect, and if we are dissenting therefrom, we certainly owe a duty to make explicit as far as we can, the grounds upon which we feel constrained to take a different view.

I make no apologies for again reproducing the two questions referred to the Full Bench, for I think that there is at least a difference of emphasis between the questions themselves, and the manner in which we have sought to answer the substance of the reference. Further, this difference should be brought out at the very outset, in the interests of clarity. The questions referred to us are phrased as follows :—

> Whether, when service inam lands have been sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their saleability under section 35 of the Madras Act XIX of 1951, it is open to the inamdar or his successor-in-title to treat the Court sale as null and void and seek to recover possession of the lands from the purchaser at the Court sale, or resist the claims of the purchaser, to be put in possession of the lands ?
>
> Whether sections 11 and 47 of the Civil Procedure Code are a bar to the maintainability of the objection ?

At the first blush, it would certainly appear as if the answer to this specific question, raised in this form, is that, notwithstanding the fact that service inam lands had been sold in execution of a mortgage decree in contravention of both public policy and the statutory prohibition under section 35 of Madras Act XIX of 1951, it is not open to the Inamdar or his successor-in little to treat the Court sale as null and void and seek to recover possession of the lands from the purchaser at the Court sale, or resist his claim for delivery of possession. That is because, the Inamdar or his successor-in-title, not having raised any objection at any prior stage of the proceedings would clearly be prohibited from putting forward such a contention under the doctrine of constructive *res judicata* which admittedly applies to execution proceedings also. Further, when we examine the case-law with regard to what might be termed the opposite school of thought, we see that the matter has also been put in some such form as follows. The doctrine inhibits the party from putting forward the claim. Not merely this, it goes further, and assumes a decision of the Court to have been made, because of a failure to put forward the contention as to saleability which should have been raised by the party affected by the sale, and which was not raised. It is hence argued that the Court must be deemed to have decided that the said property was alienable property, and, upon this logic, the question of the executing Court having the power to go behind the decree, because the decree contravenes public policy or statutory prohibition, does not arise at all. This, it appears to me, is the highest and the most forceful form in which the basis of the decisions which have taken an opposite view could be expressed. They are *Somasundaram* v. *Kondayya*[2], *Venkatapaud* v. *Appalaswami*[3], *Bullayya* v. *Subbayya*[4], *Ranga Iyer* v. *Sundararaja Ayyangar*[5], and the Bench decision of Burn and Lakshmana Rao, JJ., in *Annamalai Chettiar* v. *Kumarappan Srirangachariar*[6]. To these must be added the Full Bench decision of the Andhra High Court, that I have earlier referred to.

The case-law upon this aspect, of all the High Courts, which has been referred to during the course of arguments, is very extensive, and I propose to limit myself to the cross-section of a few selected cases. Further, my learned brother has already dealt with the relevant decisions extensively. Since I am chiefly concerned with those cases which appear to be opposed in trend to the main line of decisions of this Court, I need not cite and discuss the precedents of the latter group in detail. They

1. (1957) 2 An.W.R. 137 (F.B.).
2. (1925) 49 M.L.J. 401.
3. (1940) 2 M.L.J. 487.
4. A.I.R. 1933 Mad. 130.
5. (1933) 37 L.W. 358.
6. (1936) 71 M.L.J. 867.

range from *Lakshmana Naidu* v. *Rangamma*[1], *Raja of Vizinagaram* v. *Dantivada Chelliah*[2], *Anjaneyulu* v. *Sri Venugopala Rice Mill, Ltd.*[3], to *Adinarayana* v. *Chengiah*[4], where Venkataramana Rao, J., has scrutinised and dealt with the entire previous case-law. I might also refer to the decisions of Yahya Ali, J., in *Menakshi Ammal* v. *Chidambaram*[5], and to *Ramakrishnamma* v. *Venkatasubbiah*[6], and *Lakshmudu* v. *Ramudu.*[7] What is it that these decisions have attempted to expound as a leading principle in this matter, and how is this related to the inhibiting rule of constructive *res judicata* that I have earlier referred to? That appears to be the crux of the problem.

Those who have given some study to medieval systems of Jurisprudence, like Hindu Jurisprudence, for instance, (I might here refer to the invaluable lectures on the 'Hindu Judicial Systems' by Sri S. Varadachariar) will realise that, while many of these systems did provide for a satisfactory adjudication of civil rights by Courts or Judges, the weakest part was the effective realisation of the claims so declared. In other words, the provision of a satisfactory and speedy machinery for the execution of decrees was a comparatively late development, owing to many factors. It is a vital and valuable part of the system of law and the administration of justice, that we have inherited from the British Period in Indian History. A scrutiny of the relevant provisions of the Code of Civil Procedure and of the rules forming Order XXI of the Code, will convince any student of comparative law the great trouble taken to see that the execution of decrees is speedy and effective, that justice is not delayed or frustrated by a powerful and recalcitrant judgment-debtor, while at the same time, that a balance is preserved enabling third party claims to be investigated. It is, therefore, a salutary and fundamental principle of the law relating to execution, that the executing Court cannot go behind the decree. If it were permitted to do so, the execution proceedings would deteriorate into another original suit or trial of the claim, and that is why Pakenham Walsh, J., in *Ranga Iyer* v. *Sundararaja Iyengar*[8], said that 'any such doctrine would obviously have most disastrous consequences'. But, nevertheless, the rule has its exceptions; the exceptions will have to be confined, and carefully confined, to rigid limits, so that execution is not frustrated by a judgment-debtor or a party claiming under him who has thought up new defences, or who desires a new trial upon allegations affecting the saleability of the land.

But equally, I do not see how it is possible not to hold that, under certain exceptional circumstances at least, an executing Court can go behind the decree, and refuse to execute a decree which is both opposed to public policy and to enacted law. As I conceive it, this power of the Court is not the right of a party, or the power of a party at all; though a party can invoke the exercise of this power by bringing facts to the notice of the Court, the power arises really because the conscience of the Court is stirred. Either it is undisputed by the parties, or it is indisputably established and made evident from material which is upon the same footing as decree sought to be executed, that the decree contravenes both public policy and the enacted law. If, within such limits, such a situation arises, how can we lay it down that the executing Court cannot go behind the decree and decline to execute it? It seems to me that, viewed from this perspective, the apparently opposed streams of case-law are not truly opposed at all. They are, in fact, perfectly reconcilable, or at least reconcilable if we bear in mind the context of facts in each case relating to the decisions that have taken an opposite view, and the manner in which that view has been expounded in those decisions. In brief, any rule of estoppel or constructive *res judicata* which would prevent the inamdar or his successor-in-title from agitating this matter of saleability in execution proceedings, is upon one plane of principle. The power of the executing Court to go behind the decree, because it is opposed to public policy and also offends a statutory prohibition, is upon another plane altogether. It must be carefully delimited, and no executing Court can launch into

1. I.L.R. 26 Mad. 31.
2. (1904) 14 M L J 468: I.L.R. 28 Mad. 84
3. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).
4. A.I.R. 1937 Mad. 918.
5. (1947) 1 M.L.J. 66 : A.I.R. 1947 Mad. 241.
6. (1934) 68 M.L.J. 46.
7. I.L.R. (1940) Mad. 123.
8. (1933) 37 L.W. 358.

what is virtually a fresh trial, because of mere allegations, or of further new material claimed to be available. To stir the conscience of the Court, material on the same footing as the decree itself, and equally evident and indisputable, must show that the land is inalienable, and that the sale offends public policy and law. I am in entire agreement with my learned brother, that we must circumscribe the power of the executing Court to go behind the decree to such instances, in answering this reference.

I shall now make a few brief observations upon certain of the cases. It is clear enough, from a scrutiny of *Somasundaram* v. *Kondayya*[1], that the learned Judges were concerned in this case with what was originally an unenfrachised inam, subject to a mortgage, which was subsequently enfranchised and sold. The learned Judges held that there was, in virtual effect though not expressly, an adjudication that the property was saleable, and this is clear from the observations of Venkatasubba Rao, J., also quoted in my learned brother's judgment. In *Ranga Iyer* v. *Sundararaja Iyengar*[2], Packenham Walsh, J., has based the decision upon the logic, that there was no want of jurisdiction apparent on the face of the decree, and that it was clearly most improper for the executing Court to embark in execution on an investigation into a controverted question of fact. With this we must certainly agree.

Bullayya v. *Subbayya*[3], was a case in which the Court originally held that the land had been subsequently enfranchised or resumed, and was therefore saleable. The question before Madhavan Nair, J., related to the effect of certain proceedings before the Collector, who held that the land was a service inam.

Annamalai Chettiar v. *Kumarappan Srirangachariar*[4], is, again, a case in which (as my learned brother has pointed out) the prohibition against the alienation was not statutory, and the learned Judges, Burn and Lakshmana Rao, JJ., actually held that the executing Court had no power to go into disputed questions of fact which, if established, might take away the jurisdiction of the Court which passed the decree.

We have, no doubt, the difficulty pointed out by Viswanatha Sastri, J., in his order of reference in *Venkatasubbayya* v. *Veerayya*[5]:

> "Courts seldom pass decrees reciting therein their incompetency, or facts showing it".

But for this reason, we cannot permit every judgment-debtor or party affected to allege facts and to invite or compel the executing Court to embark on an enquiry which, in effect, would involve a retrial of the suit which had ended in the decree. I think that the necessity for the limitations that my learned brother has proposed, with which I entirely agree, would at once become apparent, if we remember that we are here concerned with an exceptional power of the Court to go behind the decree that it is executing, not a power or the right of the party. I might here refer to certain observations of Page, C.J., in *S. A. Nathan* v. *Samson*[6], with which, with the greatest respect, I am unable to agree, for the very reason that I feel that this passage does not sufficiently emphasise the distinction that I have in mind between the right of a party and the power of the executing Court to go behind the decree, as a matter of conscience, in exceptional cases :

> "What is meant by the word 'apparently' in the passage that I have cited ? Does it mean that where the want of jurisdiction in the decretal Court is patent the executing Court can question it, but where it is latent the executing Court possesses no such power, and must execute the decree ? But if the fact is that the decretal Court had no jurisdiction to pass the decree, I ask, with all due respect to the learned Judges who decided *Gora Chand's case*[7], what difference does it make in principle or as a matter of common-sense whether the executing Court ascertains that fact by perusing the decree, or after hearing evidence or holding an enquiry ?"

In my own view, there is surely a very wide difference in practical effect: If the executing Court were to be permitted to go behind the decree by embarking upon an extensive enquiry into hitherto undisclosed material, whenever it is alleged that

1. (1925) 49 M.L.J. 401.
2. (1933) 37 L.W. 358.
3. A.I.R. 1933 Mad. 130.
4. (1936) 71 M.L.J. 867.
5. (1957) 2 An.W.R. 137 (F.B.).
6. (1931) I.L.R. 9 Rang. 480.
7. (1925) I.L.R. 53 Cal. 166.

the decree lacks jurisdiction or that a decree for sale is opposed to public policy and to enacted law, and this is itself a matter in controversy, the executing Courts would lose their character and function as Courts of re-trial. Further, the entire effect of the processual law relating to the execution of decrees, enabling a decree-holder to obtain the fruits of his adjudicated claim, would be stultified.

There is a passage in the Full Bench decision in *Venkataseshayya* v. *Veerayya*[1], which, if I may say so with great respect, brings out in clear relief the true distinction between these apparently opposed streams of case-law, which themselves flow from the application of principles upon different planes. The passage occurs in the judgment of the learned Chief Justice (page 150) and runs as follows :—

"There is no conflict between the principles of *res judicata* and that of prohibited alienation of particular properties on the ground of public policy. An alienation of properties prohibited by public policy or statute may be void. But the said prohibition cannot have the effect of depriving the jurisdiction of Courts to decide in a particular suit whether the alienation is void or not. Nor can it override the principles of *res judicata*. The former belongs to the domain of substantive law, and the latter to the rule giving finality to decrees of competent Courts. The sanctity of final judgment is as much based on public policy, as prohibition against the alienation of properties annexed to certain public offices. . . . . . . When the defence which ought to be raised is not raised, the Court must be deemed to have decided against the contention not raised."

With the greatest respect, I venture to suggest that the two principles of *res judicata* or constructive *res judicata*, and of prohibited alienation of properties on grounds of public policy and the enacted law, are upon different planes. The first principle inhibits the party and takes away the power of the Court to try the plea, in all contested cases raising a mixed question of fact and law (as the learned Chief Justice himself observes in this very context), by deeming a decision to the effect that the land was alienable. The second principle is an overriding principle, really related to the conscience of the Court. Though a party may invoke the exercise of the power, the Court will exercise it only under exceptional circumstances ; that is, under the conditions enunciated by my learned brother. In this sense, the principles are reconcilable, and no party can invite an executing Court to embark on an enquiry into a controverted question of fact, with reference to material which is not upon the same footing as the decree sought to be executed, nor equally evident. But where the fact is not in dispute that the decree contravenes both public policy and the law, because it is a decree for sale of service inam land, or where it is incontrovertibly established by material on the same footing as the decree itself, in the very suit, the executing Court is entitled, as a matter of consience and its power, to go behind the decree and to refuse to execute it. The rule of constructive *res judicata* cannot operate to prevent the Court from doing so, both because this is an overriding power, and because, in such an instance, it would really be a matter of refusal to infringe the law, and there can be no estoppel against statute.

I would also answer the reference accordingly.

The appeal then came on for final disposal before *Ramaswami, J.*, who delivered the following

JUDGMENT*.—On this expression of Full Bench opinion, *viz.*, that an executing Court cannot investigate that the property which has been sold is an inalienable service inam when there is no foundation for it either in the plaint or in the written statement or issues or judgment in the mortgage suit, this C.M.A. has got to be dismissed and is hereby dismissed.

The learned advocate, Mr. Champakesa Ayyangar, pressed on me on the other hand that he is in possession of respectable evidence part of which he placed before the executing Court which he will be able to place before the executing Court and a partition deed, which he produced today and which naturally I am not prepared to look into, to show that the property in question is an inalienable service inam and that it was contrary to the public policy to sell and this would enable him to file a separate suit, and that a little time therefore should be given to him to file such a suit, and that till then the executing Court may stay its hands and not deliver

1. (1957) 2 An.W.R. 137 (F.B.). * 6th April, 1960.

possession. The result is *prima facie* reasonable but this is a matter which might be considered by the executing Court and I cannot fetter that discretion either way. That an executing Court has power to stay its hands for adequate reasons cannot be gainsaid. But whether in the circumstances of this case, it should exercise such a discretion is a matter for the executing Court to decide.

The learned advocate, Mr. Ramamurthi, urges that he has got several grounds to show that such a separate suit cannot be filed and secondly that the relief asked for cannot be granted in such a separate suit. But that is not a matter for me to decide. I make no pronouncement either regarding the tenability of the suit or its limitation. This is a matter entirely for the Court in which the suit is filed to decide.

The net result is that beyond drawing the attention of the executing Court that if it is satisfied that a little time should be given before delivery of possession is made, it would not be beyond its province or powers to grant the same, I do not wish to say anything more. But whether such a discretion should be exercised and on what terms I once again make it clear is entirely a matter for that Court to decide.

In the circumstances, each party will bear its own costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

Abdul Gani minor since declared a major *vide* order dated 5th January, 1960 in C.M.P. No. 10 of 1960 and others.. *Appellants**

v.

Messrs. V. M. Periyaswami Chetty and Co .. *Respondents.*

Partnership Act (IX of 1932), sections 45 and 47—Legal representative of a deceased partner—If bound by an acknowledgment made by the surviving partner subsequent to the dissolution of the partnership by death.

Limitation Act (IX of 1908), section 21 (2)—Scope of.

The legal representatives of a deceased partner cannot be validly bound for payment of the partnership debts by an acknowledgment made by the surviving partner after the dissolution of the partnership by the death of the other partner. The theory of implied agency disappears on the dissolution of the partnership and the Proviso to section 45 of the Partnership Act would apply in such cases and section 47, which relates to obligations *inter se* the partners so far as may be necessary for winding up the affairs of the partnership cannot be invoked to bind the legal representatives of the deceased partner merely on the basis of an acknowledgment made by the surviving partner after the date of dissolution.

Under section 21 (2) of the Limitation Act the theory of implied agency underlying the concept of a partnership is not by itself sufficient to enable a partner to bind the other partners by an acknowledgment of liability of the firm unless there is evidence, however slight, or other circumstances such as course of business or conduct of parties, as to make the non-acknowledging partner also liable.

On appeal from the Judgment and Decree of the Hon'ble Mr. Rajagopala Ayyangar, J., dated 15th September, 1955 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 82 of 1953.

R. Thirumalaiswami Naidu, for Appellant.

K. M. Bashyam Ayyangar, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—The suit, C.S. No. 82 of 1953, out of which the above appeal arises was filed on the Original Side of this Court by a firm of partnership, Messrs. V.M. Periyaswami Chetty & Co., to recover a sum of Rs. 21,701-2-6 with further interest and costs under the following circumstances.

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*O.S.A. N. 28 of 1956, 18th January, 1960.
(28th of Pausa, 1881, Saka).

The plaintiff-firm is carrying on business in metals, brass and copper sheets, etc., at 399, Mint Street, Sowcarpet, Madras. They sold and delivered goods (metal, brass and copper sheets, etc) to another firm called M. K. M. Khader Masthan Sahib and Brother, which was a partnership consisting of two partners, who were brothers, M. Khader Masthan Sahib and Mohideen Mashtan Sahib. This firm was carrying on business at Ayyasami Pillai Street, Pudupet, Madras. The course of business in respect of the dealings between the plaintiff-firm and the firm of M. K.M. Khader Masthan Sahib and Brothers appears to be to settle accounts periodically at the end of Panguni in each Tamil year, and obtain the signature of one or other of the partners of the M.K.M. firm. On 14th July, 1950, there was a settlement of accounts as on 13th April, 1950, in and by which one of the partners of M. K. M. firm, namely, Khader Masthan Sahib acknowledged that a sum of Rs. 32,255-5-6 was due by the M. K. M. firm to the plaintiff-firm. Even thereafter the plaintiff-firm dealt with the M. K. M. firm and obtained part payments towards the amounts due to them. The final result of these transactions as on 6th September, 1950, was a total liability of Rs. 21,701-2-6 due by the M. K. M. firm to the plaintiff-firm. It is this amount together with interest claimed at 12 per cent. aggregating to Rs. 7,420 which formed the subject-matter of the suit.

The partner, Mohideen Masthan of the M. K. M. firm, died on 5th October, 1949. The other partner Khader Masthan also died in November, 1952. The suit was instituted on 20th February, 1953, impleading the legal representatives of both the deceased partners. The first defendant in the suit is the mother of the partners ; the second defendant is the widow of Khader Masthan and defendants 3 to 9 are the children of Khader Masthan. The tenth defendant is the widow of Mohideen Masthan and defendants 11 to 15 are the children of Mohideen Masthan. A decree was passed by the learned Master on 15th December, 1953, against the second defendant, the widow of Khader Masthan and defendants 3 to 9 the children of Khader Masthan and also against the first defendant as the legal representative of Khader Masthan. This decree has become final.

Before the learned Judge who tried the suit on the Original Side the suit was resisted only by defendants 11 to 14, the minor children of Mohideen Masthan, who were represented by Sri H. Rama Rao, appointed as the Court-guardian. The contention raised on their behalf was that there was no proof that Khader Masthan and Mohideen Masthan were partners, and that the liability for which Khader Masthan had signed in the books of the plaintiff firm was not binding upon the legal representatives of Mohideen Masthan, and that in any event the claim as against them (defendants 11 to 14) was barred by limitation.

The learned Judge held that Exhibit P. 11, which is a deed of dissolution, dated 16th July, 1950, was a clear proof of a partnership having subsisted between the brothers, and it was clearly shown that Mohideen Masthan and Khader Masthan were partners in the business of M. K. M. Khader Masthan Sahib and Brothers. He therefore held that the suit liability was a liability of the M. K.M. firm. The question of limitation was overruled by the learned Judge relying upon Exhibit P. 6, dated 18th March, 1951, which was a reply to a lawyer's notice issued on behalf of the plaintiff-firm in which the suit claim was acknowledged by the tenth defendant acting for herself and as guardian of her minor children, defendants 11 to 14, and also by 15th defendant who was the legal guardian of her minor children and that an acknowledgment by a lawful guardian was sufficient to extend the period of limitation in favour of the creditor, the learned Judge negatived the plea of limitation. In the result the suit was decreed as prayed for with costs.

Defendants 11 to 14 are the appellants in this appeal, and their only contention is that the suit ought to have been dismissed so far as they are concerned on the ground of limitation. The tenth defendant is not the lawful guardian of her minor children, defendants 11 to 14 as the parties are Muslims and as under the Muhammadan Law it is now well settled ever since *Imambandi's case*[1], that the

1. (1917) 35 M.L.J.422 : I.L.R. 45 Cal. 878 : L.R. 45 I.A. 73 (P.C.).

only legal guardian of property of a Muhammadan minor is his father, paternal grandfather or an executor appointed by the father and the paternal grandfather under a testament. The learned counsel appearing for the respondents before us conceded this postition and we have, therefore, to proceed on the footing that the acknowledgment relied upon under Exhibit P. 6 dated 18th March, 1951, will not avail the plaintiffs-firm to sustain any cause of action against the appellants.

On behalf of the plaintiffs-respondents the point urged to save the suit claim from the bar of limitation is the signing by Khader Masthan of the account settled on 14th July, 1950. If this can bind the appellants certainly the decree of the learned Judge can be upheld.

It must be remembered that on the date when Khader Masthan made the acknowledgment on 14th July, 1950, his brother and co-partner Mohideen Masthan was dead, he having died on 5th October, 1949. By reason of his death the firm of M.K.M. Khader Masthan & Brothers became dissolved. The question for consideration, therefore, is can a partner make a valid acknowledgment of a liability of a partnership debt after the dissolution of the partnership by reason of the death of a partner so as to bind the minor legal representatives of the deceased partner, and to afford the creditor in whose favour the acknowledgment is made a fresh period of limitation to be computed from the time when the acknowledgment is made.

Though there is a direct decision of this Court reported in *Rajagopala Pillai* v. *Krishnaswami Chetti*[1], holding that the legal representatives of a deceased partner cannot be validly bound by an acknowledgment made by the surviving partner after dissolution caused by death, inasmuch as the matter has been argued before us we would consider the position as if the matter is *res integra*.

During the subsistence of a partnership, the partners are agents as well as principals *inter se*, inasmuch as every partner is deemed to be in law the agent of the other partner. Section 18 of the Partnership Act provides, that a partner is the agent of the firm for the purposes of the business of the firm. Section 19 deals with the implied authority of a partner as agent of the firm and sub-section (2) of that section provides for several acts to which the implied authority of a partner cannot extend. The power to acknowledge a debt of the partnership is not one such act provided for under section 19 (2) of the Partnership Act. But in order to test the validity of an acklowledgment of a debt to conform to the requirements of the Limitation Act one has to examine the relevant provisions of the said Act. Section 21 (2) of the Indian Limitation Act is as follows :

> " Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of written ackbowledgment signed or of a payment made by, or by the agent of, any other or others of them ".

The scope of section 21 (2) of the Indian Limitation Act was considered by a Full Bench of this Court in *Veeranna* v. *Veerabhadraswami*[2], wherein it was held as follows :—

> " The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner ; and it amounts to saying that if you have no more than a written acknowedgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability."

That decision also pointed out that the authority of one partner to make the acknowledgment may be inferred from other circumstances such as the position of the other partners of the firm in the business. It is therefore clear that under the Limitation Act the theory of an implied agency which underlies the conception of a partnership under the Indian Partnership Act is by itself not sufficient to enable a partner to bind the other partners by an acknowledgment of a liability of the firm. But it may be that very little evidence will be sufficient to make the non-acknowledging partner liable such as the course of business, the conduct of the parties, etc. As has been pointed out by the Full Bench itself it is not possible or desirable to

1. (1898) 8 M.L.J. 261. 2. (1918) 34 M.L.J. 873: I.L.R. 41 Mad 427 (F.B.).

point out the quantum of evidence necessary to make such acknowledgment by one partner valid and binding on the other partners.

Once the partnership is dissolved even the theory of implied agency disappears. The jural relationship of partners having been put an end to thereafter there can be no question of any partner acting in any representative capacity so as to bind the firm or his quondam partners. Sir Charles Hall, V.C., observed as follows :—

"If while the partnership subsisted each partner could and should be deemed to be the agent o the other to make the payments, so as to exclude the operation of the statute, such agency, I consider, terminated on the dissolution of the partnership ; no such agency being by the deed of dissolution expressly or otherwise impliedly created." (*Watson* v. *Woodman*).[1]

But reference will have to be made to section 47 of the Partnership Act which is as follows :—

"After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

It may be contended, as in fact it was, that despite the dissolution of the M.K.M. firm by reason of the death of Mohideen Masthan the authority of Khader Masthan to make a valid acknowledgment of the partnership liability continued to subsist in accordance with the terms of section 47. But two things stand in the way of accepting such a contention. One is that section 47 enables the continuance of the authority only 'so far as may be necessary to wind up the affairs of the firm and to complete the transactions begun but unfinished.' There is no proof in this case that the acknowledgment of the liability was necessary to wind up the affairs of the firm. A payment of debt will be necessary and will be a proper step towards the winding up of the firm. But the surviving partner cannot choose to keep alive a debt by making periodical acknowledgments and pretend that that was a step necessary to wind up the affairs of the firm. Of course there may be circumstances in a particular case in which even such a step may be held to be necessary towards winding up. In the present case there is complete absence of any evidence to prove this ingredient of section 47 even if it can otherwise be invoked.

The next thing which one has to reckon with before applying section 47 is that it purports to regulate only the rights and obligations between partners *inter se*. If one partner dies there cannot be any relationship of partners between the suriving partner and the legal representatives of the deceased partner. We are of opinion that section 47 cannot be invoked to a case of this description.

Section 45 of the Partnership Act may now be referred to :

"Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution.

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be partner."

The Proviso may be invoked to the facts of the present case as the act that is relied upon for holding the estate of a deceased partner liable is an act done after the date on which the partnership ceased.

Learned counsel for the respondent relied upon *Seshi Ammal* v. *Vairavan Chettiar*[2] as containing observations supporting his contention. We do not think that he is right in so contending. In *Seshi Ammal* v. *Vairavan Chettiar*[2], what was held was that the estate of a deceased partner is not liable to a creditor for a debt incurred by the surviving partner subsequent to the death of the former although the debt was incurred to take up bills of lading for and obtain delivery of goods which had been ordered by the partner during the lifetime of the deceased partner but did not come forward until after his death. The actual decision in the case was that the estate

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1. 29 Eq. 721 at 730.

2. (1918) 35 M.L.J. 669 : 42 Mad. 15.

of a deceased partner was not liable. We do not read the observations in the judgment of Seshagiri Iyer, J., as in any way supporting the plea of the respondent in the present case, namely, that an acknowledgment by a surviving partner of a partnership liability can extend the period of limitation so as to bind the legal representatives of the deceased partner.

The next decision relied upon by the learned counsel for the respondent is *Muthuswami Nadan* v. *Sankaralinga Chetty*[1]. The learned Judges held in that case that there can be no presumption of authorisation of acknowledgment on the part of the acknowledging partner in a case where there has been a dissolution of partnership. Their Lordships observe :

> "In such a case, it seems to be clear that express evidence of authority must be forthcoming, if the acknowledgment is to be held binding on any ex-partner except the one who made it".

It was no doubt found as a fact in that particular case that there was authorisation to acknowledge the debt. Neither the decision in the case, nor the observations therein can really help the respondent in the present case.

The learned counsel also relied upon *Mahadeva Aiyar* v. *Ramakrishna Reddiar*[2]. In that case the finding was to the following effect :

> "There is also ample evidence from the surrounding circumstances which we are entitled to look at. Vide *Veeranna* v. *Veerabhadraswami*[3] for the conclusion that there was express authority for defendant 1 to make the acknowledgment to rebut possible validity of the contention that from the wording of section 21 (2), Limitation Act, there is no presumption in India that a partner has power to acknowledge though the validity of this contention is at least doubtful after the exposition of the sub-section by the Full Bench.

Spencer J., observed, at page 72, as follows :—

> "Fifth defendant, in Exhibit G a loan application made to the South Indian Bank, and 7th defendant in his affidavit (Exhibit F.) and in his letter (Exhibit B-2) to the Receiver admitted that the debt due to the plaintiff was a partnership debt of the P. K. N. Firm and P.Ws. 3 and 4 deposed without being contradicted or shaken in cross-examination that the payment of Rs. 1,000 was joint payment by both 1st and 5th defendant and that the entry in the accounts was made under the authority of both of them. This is quite enough to fix all the appellants with liability and to save limitation."

We do not think that the decision in the above case is any authority in support of the respondents' contention.

As stated already the direct decision is that contained in *Rajagopala Pillai* v. *Krishnaswami Chetti*[4], which has been followed subsequently by the Judicial Commissioner of the Nagpur Court in *Sheonarain* v. *Babulal*[5]. Lindley in his book on Partnership sets out the legal position thus :

> "But it is thought to be still good law applicable to the Limitation Act, 1939, and notwithstanding the repeal of section 14 of the Mercantile Law Amendment Act, 1856, that after a dissolution a part payment by a continuing or a surviving partner will not prevent a retired partner or the executors of a deceased partner from availing themselves of the statute ; and the same is true of acknowledgment." (Lindley, 11th Edition at page 338).

The decision in *Babu* v. *Davambai*[6], held as follows :

> "An acknowledgment of a debt, due by the firm, made by a surviving partner after the firm is dissolved by the death of a partner, is binding on the heirs of the deceased partner, where it is not proved that the creditor had notice of such a dissolution."

That decision dealt with the provisions of sections 261 and 264 of the Indian Contract Act which subsisted before the Indian Partnership Act. Section 264 of the Contract Act corresponding to section 45 of the Partnership Act, did not contain the Proviso now found in section 45 of the Partnership Act. It cannot therefore be treated as an authority for deciding a case governed by the present Partnership Act.

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1. (1915) M.W.N. 722.
2. (1926) 50 M.L.J. 67.
3. (1918) 34 M.L.J. 373 : I.L.R. 41 Mad. 427 (F.B.).
4. (1898) 8 M.L.J. 261.
5. A.I.R. 1925 Nag. 268.
6. (1935) I.L.R. 60 Bom. 5.

Following *Rajagopala Pillai* v. *Krishnaswami Chetti*[1], we are of opinion that defendants 11 to 14 are not bound by the acknowledgment made by Khader Masthan.

We therefore hold that the suit is barred by limitation as against defendants 11 to 14, the appellants before us. In the result the judgment and decree of the learned Judge will stand modified by the suit being directed to be dismissed in so far as defendants 11 to 14 are concerned. There will be no order for costs in favour of defendants 11 to 14 against the plaintiffs either here or in the suit. The appellants will pay the Court-fee due to the Government.

R.M. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

A.R.G.B. Balagurumurthy Chettiar and others .. *Appellants**

v.

Ranganayaki Ammal and others .. *Respondents.*

Limitation Act (V of 1908), Articles 60 and 120—Applicability—Deposit repayable on demand—Refusal to receive the notice of demand—Right to sue accrues.

The plaintiff an employee of a firm of which the first defendant was the manager, deposited amounts with the first defendant in 1943 or 1944. On 18th February, 1951, the first defendant passed a letter to the plaintiff in the following terms:—'On 13th April, 1950, there is a credit of Rs. 7,244-1-3 in your name in our accounts.' The plaintiff issued a notice making a demand but the defendants refused to receive the notice. The suit was filed within three years of the date of the refusal.

The plaintiff alone gave evidence that the money was deposited as directed by the 1st defendant and at the end of the year when he asked the 1st defendant to pay interest on the sum he was told that interest would be added to the sum and both principal and interest would be paid next year and by common consent the deposit was allowed to continue till 1951.

Held :—There was a deposit and an agreement that it was repayable on demand and therefore Article 60 of the Limitation Act would apply.

Assuming Article 60 of the Act does not apply under the residuary article, Article 120, the suit would be in time because the right to sue would accrue only when the defendants refused to accept the notice issued by the plaintiff.

Appeal against the decree of the Subordinate Judge of Coimbatore in Original Suit No. 137 of 1953.

S. Sitarama Ayyar, S. Rajaraman and *E. S. Sesha Ayyar,* for Appellants.

D. Ramaswamy Ayyangar and *G. M. Nathan,* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The only question raised in this appeal is that the plaintiff's suit is barred by time. The suit was for recovery of a sum of Rs. 7,077-2-6 in the following circumstances. It is common ground that the plaintiff deposited sums of money with the defendant's family firm doing business in the name and style of A.R.G. Balarama Chettiar Sons with first defendant as manager some time in 1943 and 1944. The plaintiff was an employee of the defendant firm and apparently the amounts were deposited in his capacity as an employee. The plaintiff left the services of the defendant firm in or about February, 1951. On 18th February, 1951, the first defendant on behalf of the family firm passed a letter to the plaintiff in the following terms :—

"On 13th April, 1950, there is a credit of Rs. 7,244-1-3 in your name in our accounts."

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1. (1898) 8 M.L.J. 261.

*Appeal No. 447 of 1955. 24th September, 1959.

The plaintiff alleged that subsequent to the letter the defendants paid on different dates sums of money aggregating to Rs. 1,400, and there was still a sum of Rs. 7,077-2-6, due to him and in spite of repeated demands, the defendants had not chosen to pay him the amount. The plaintiff issued a notice through his lawyer making a demand but the defendants refused to receive the notice. The suit was filed on 31st March, 1953. The main plea in the written statement was the bar of limitation. The defendants pleaded that limitation would run from date of the deposit and as the suit had been laid several years after the three years period of limitation, it was barred. Referring to the letter, dated 18th February, 1951, which was admitted, the defendants contended that it did not save limitation as it was not an acknowledgement of liability. At best it was a recital of fact alleged to exist on 13th April, 1950, in the accounts. The learned Subordinate Judge of Coimbatore held that the suit claim was not barred by limitation. He applied Article 60 of Schedule I of the Limitation Act. He placed reliance on the acceptance by the defendants of the fact of deposit in 1943 and 1944 and evidently the learned Judge was of the opinion that the demand by the plaintiff was made only within three years from the date of the suit, apparently referring to the notice before suit.

It is quite true, as learned counsel for the defendants-appellants contends, that the reasoning of the learned Subordinate Judge is neither clear nor unassailable. But on the evidence of the plaintiff it appears to us that the case might be brought under Article 60, because the plaintiff who alone gave evidence in the case deposed that the money was deposited as directed by the defendants and at the end of the year when he asked the first defendant to pay interest on the sum, he was told that interest would be added to the sum and both principal and interest would be paid next year. So there was a deposit with an agreement that it was repayable on demand. According to the plaintiff, by common consent the deposit was allowed to continue till February, 1951, when the defendants passed the letter above-mentioned, to inform the plaintiff the exact amount which was to the credit of the plaintiff in their accounts. There is no evidence of any refusal on the part of the defendants to pay the plaintiff the amount deposited by him with interest. Indeed the only refusal can be said to be when they refused to receive the notice of demand issued by the plaintiff through his lawyer before the institution of the suit. The suit was filed within three years of the date of the refusal of this notice. None of the defendants gave evidence that at any time the firm refused to pay the amount depsited by the plaintiff. Indeed the plaintiff's statement stands uncontradicted that subsequent to February, 1951, he was being paid amounts aggregating to Rs. 1,400 towards the amount payable under the deposit. The defendants did not produce their accounts. In the absence of such accounts we must accept the plaintiff's case both as regards the nature of the deposit and the amounts standing to the plaintiff's credit in 1950 and the payment of Rs. 1,400 towards the amount deposited and interest thereon. The suit was, therefore, not barred by limitation.

Even assuming that Article 60 did not apply, then the only other article which can apply is Article 120, the residuary article, and that provides a period of six years from the date when the right to sue accrues. It appears to us reasonable to hold that in the case of money deposited the right to sue will not arise till there has been a demand and a refusal. Otherwise even though by common consent money is allowed to be in deposit for a period exceeding six years it would be open to the person with whom the money is in deposit to plead the bar of limitation when there is a demand to be paid back the amount. It is impossible to subscribe to such an astounding proposition. If Article 120 is the article which applies, then we hold the right to sue accrued only when the defendants refused to accept the notice issued by the plaintiff through his lawyer. The suit was, therefore, well within time. In the result the appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Om Prakash Gupta .. *Appellant**

v.

The Commissioner of Police, Madras and others .. *Respondents.*

Madras Cinemas Regulation Rules (1957), *rule* 13—*'Lawful possession of the site, building and equipment'—What amounts to—Tenant holding over against the desire of the landlord—If in lawful possession—Decision of licensing authority—When could be questioned in Civil Court.*

Constitution of India (1950), *Article* 226—*Licensing of premises under Madras Cinemas Regulation Rules—Decision of licensing authority that he is not satisfied about the applicant's possession—When could be questioned.*

A lessee in possession of a premises, the lease in whose favour has expired, and who is not entitled to any protection under the Madras Buildings (Lease and Rent Control) Act 1949, is one who is not legally entitled to be in possession though it may be that he cannot be ousted from the premises without recourse to a Court of law. Where the licensing authority under the Madras Cinemas Regulation Act, 1955, is not satisfied that the applicant for license is in lawful possession of the building within the meaning of rule 13 of the Madras Cinemas Regulation Rules, 1957, he can refuse to grant the licence. Barring exceptional cases of *prima facie* perverse orders of refusal it is not within the province of the High Court under Article 226 of the Constitution to examine the correctness of the view taken by the licensing authority whether the applicant is in lawful possession, of the premises, equipment, etc. Unless it is established that the licensing authority is compelled by any statutory provision to grant or renew the license no writ of *mandamus* could lie in that regard.

Where equipment is taken on hire the possession of such equipment beyond the date of the hire-agreement without the consent of the owner would be *per se* unlawful and such hirer cannot satisfy the requirement of rule 13.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Rajagopala Ayyangar, dated 25th November, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1002 of 1959 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the 1st respondent to renew the Cinema licence for Rajkumari Talkies for the period commencing from 1st November, 1959 to 31st October, 1960.

R. M. Seshadri, K. V. Venkatasubramania Ayyar, Raw and *Reddy* and *V. Venkataraman* for Appellant.

The Advocate-General (*V. K. Thiruvenkatachari*), The Additional Government Pleader (*M. M. Ismail*), *N. C. Raghavachari, N. S. Varadachari, T. C. Bhashyam, T. C. A. Thirumalachari, T. Venkatadri* and *K. Raghavan*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These appeals from the judgment of Rajagopala Ayyangar, J., arise out of four writ petitions, which were heard and disposed of by him on 25th November, 1959. They were heard together, because they related to the renewal of licences for conducting cinematograph shows in certain theatres in the City. W.A. No. 151 of 1959 is from the judgment so far as it concerns W.P. No. 1002 of 1959 and relates to the theatre known as Rajkumari Talkies. The other three appeals arising out of W.P. Nos. 969 to 971 of 1959 relate to another theatre called Murugan Talkies. There was another writ petition, W.P. No. 992 of 1959, which was also heard along with the other writ petitions; but there is no appeal before us in that petition.

The two petitioners are lessees of the two aforesaid theatres. The contesting respondents are the owners of the two theatres and the talkie equipment installed in them. Both the Board of Revenue and the Commissioner of Police were made parties to the petition, inasmuch as the relief sought was directed against the orders passed by them. Though the main point which is common to all the appeals, involves an interpretation of rule 13 of the Rules framed under the Madras Cinemas (Regulation) Act,

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* W.A. Nos. 151 and 160 to 162 of 1959.

3rd February, 1960.
(14th Magha, 1881—Saka)

1955, it is necessary to state the facts relating to each of the theatres separately. We first take up W.P. No. 1002 of 1959, out of which W.A. No. 151 of 1959 arises. The petitioner who is the appellant before us one Om Prakash Gupta took on lease the theatre with the furniture and equipment from T. R. Rajkumari, first for a term which ceased on 21st September, 1955. Thereafter, there was a further lease for a term of three years from 22nd September, 1955, with the option on the part of the lessee to obtain a renewal for a further period of one year. That option was exercised, and the lease eventually came to an end on 21st September, 1959. During the currency of the lease, the appellant applied for and obtained from the Commissioner of Police licences to exhibit cinematographic films in the theatre under Madras Cinemas (Regulation) Act, 1955, from 1955 onwards. The last of such licences expired on 31st October, 1959. Even before this date, the owner of the theatre appears to have informed the Commissioner of Police that the period of lease would terminate on 21st September, 1959 and that she was unwilling to permit the lessee to continue in possession thereafter. On 8th September, 1959, the Commissioner of Police sent a Memorandum to the lessee in the following terms.

"As the lease period for which you executed an agreement expires on 22nd September, 1959, the cinema licence pertaining to Rajkumari Talkies, Madras-17, will not be renewed from 22nd September, 1959, in your name, unless you produce a letter of consent obtained from the owner of the above theatre."

On 30th September, 1959, the Commissioner of Police addressed the following communication:

"Under rule 13 of the Madras Cinemas (Regulation) Rules, 1957, the licensee of a cinema theatre shall produce documentary evidence to the satisfaction of the Licensing Authority to show that he is in lawful possession of the site, building and equipment with the consent of the theatre owner.

"The lease deed submitted by Smt. T. R. Rajkumari, owner of the theatre, shows that the period of lease between you and her in respect of the above theatre expired on 22nd September, 1959. She has represented that she has not renewed the lease in your favour from 22nd September, 1959 and that, as such, you are not entitled to be in possession of the theatre.

"In the circumstances, it is proposed to revoke the validity of the Cinema Licence immediately for non-compliance with the provisions of rule 13. Please submit you representation, if any, within three days of receipt of this memo. failing which it will be construed that you have no representation to make, and orders will be passed *ex parte* ".

The lessee protested, submitting firstly that the Commissioner had no power to revoke the licence before the expiry of the term of the licence already in force, and, secondly, that rule 13 of the Cinematograph Rules had no application, as he was entitled to be in possession until he was evicted by a proper Court of law. The lessee applied for a renewal of the licence from 1st November, 1959. To this, the Commissioner of Police replied thus :—

"As already informed in my Memorandum No. 27251/E-2/59, dated 21st September, 1959, the Cinema Licence for Rajkumari Talkies, Madras-17, will not be renewed in your favour from 1st November, 1959, unless a letter of consent is produced from the owner of the theatre."

The lessee preferred an appeal to the Board of Revenue against this order of the Commissioner of Police. The appeal was dismissed. The material portion of the Board's order runs as follows.

"The Board is satisfied that, on the facts shown herein, the Commissioner of Police is justified in refusing to renew the licence, as mere juridical possession in the absence of a valid lease is not sufficient ".

The Board referred to the decision previously rendered by it in the case of the Murugan Talkies, which is the subject-matter of the other three appeals. Thereupon, the lessee filed the petition under Article 226 of the Constitution. (W.P. No. 1002 of 1959) for the issue of a writ of *mandamus*, directing the Commissioner of Police, Madras, to renew the cinema licence for Rajkumari Talkies for the period from 1st November, 1959 to 31st October, 1960. Subsequently, the owner of the theatre, T. R. Raj, kumai, and the Board of Revenue were impleaded as additional respondents, beside the Commissioner of Police, Madras.

Rule 13 of the Madras Cinemas (Regulation) Rules, 1957, runs as follows :

"If the applicant for the licence is the owner of the site, building and equipment, he shall produce to the licensing authority the necessary records relating to his ownership and possession thereof. If he

is not the owner, he shall, to the satisfaction of the licensing authority, produce documentary evidence to show that he is in lawful possession of the site, building and equipment ".

Before Rajagopala Ayyangar, J., three contentions were raised regarding this rule, namely, (1) that it was *ultra vires* and invalid, (2) that it would apply only to the grant of a licence in the first instance, and not a renewal of a licence, and (3) that the petitioner (lessee) must be deemed to be in lawful possession of the site, building and equipment, as required by the rule. Before us, the first two of the contentions were not pressed by counsel for the appellant. The argument was therefore confined to the third contention. Rajagopala Ayyangar, J., held that, on the termination of the lease, the appellant could not be said to be in lawful possession of the premises. He also held that the appellant was not entitled to the benefit of the provisions of Madras Buildings (Lease and Rent Control) Act, 1949, as the lease in question was a composite lease of building and equipment. The learned Judge dismissed the W.P. Hence the above appeal.

We heard very interesting arguments from leading counsel, on both sides as to the meaning and significance of the expression "lawful possession." Mr. K. V. Venkatasubramanya Ayyar sought to make a distinction between " lawful possession " and " rightful possession." " Lawful possession ", he submitted, is possession which is recognised and protected by law. He relied on the well-known principle of English and Indian law that possession is good title against all but the true owner. A person without title but who is in possession and who has been dispossessed otherwise than in due course of law, can bring a suit to be reinstated, even if the person by whom he was dispossessed be the true owner or a person authorised by or claiming under him (vide *Narayanan Row* v. *Dharmachar*[1]. Learned counsel for the appellant placed strong reliance on a decision of the Bombay High Court in *K. K. Verma* v. *Union of India*[2]. It was held in that case by a Division Bench consisting of Chagla, C.J., and Dixit, J., that, under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law, and, although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by statute. All that the landlord can do is only to eject his erstwhile tenant by recourse to law by obtaining an order of ejectment. The learned Judges were construing section 3 (1) (*b*) of the Government Premises (Eviction) Act (XXVII of 1950), under which if the competent authority is satisfied that any person is in unauthorised occupation of any government premises, the competent authority may, by notice served by post or otherwise, order that that person as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within fifteen days of the date of the service of the notice. The learned Judges held that a tenant of Government Premises who continues in possession after the termination of his tenancy by a notice to quit, cannot be said to be in unauthorised occupation of the premises within the meaning of that provision. One circumstance which was taken into consideration by the learned Judges was that the Act was a penal statute and it would not be proper to give a wider interpretation to the expression "unauthorised occupation", if a narrow interpretation were possible. Reference was also made to *Gulam Mahomed* v. *Emperor*[3], where it was held in a criminal case that a tenant at sufference in India has been recognised to have certain limited rights for possession, and it was observed in that case that landlords and tenants should not take the law into their own hands, but should proceed by regular process in the civil Courts, as prescribed by the Legislature.

The learned Advocate-General who appeared for the owner of the theatre cited to us a number of decisions of English and Indian Courts in support of his contention that a tenant, on the termination of the lease in his favour, is not entitled to continue in possession and is liable to be evicted by the lessor and that he is also liable for mesne profits. In *Henderson* v. *Squire*[4], a tenant remaining in possession after the end of the term is described as one in wrongful possession. In *Jones* v. *Foley*[5], a tenant, on the expiration of his tenancy, was held to have no right whatever to be on the premises

1. (1902) 13 M.L.J. 146 : I.L.R. 26 Mad.
2. A.I.R. 1954 Bom. 358.
3. A.I.R. 1919 Bom. 97.
4. L.R. (1869) 4 Q.B. 170.
5. L.R. (1891) 1 Q.B. 730.

—"He was a trespasser." The Privy Council ruled in *Mahant Jagarnath Das* v. *Jhanki Singh*[1], that a lessee of zerait land is a tenant within the meaning of section 3 (3) of the Bengal Tenancy Act, 1885, only during the continuance of the term of the lease, and that, upon the expiry of the term, he became a trespasser, liable to be ejected. Such a person would be liable for mesne profits (vide *Harry Kempson Gray* v. *Bhagu Mian*[2].) Indeed, the possession of a tenant, on the expiration of the term of the lease, becomes, wrongful, and, therefore, adverse to the landlord within the meaning of Article 144 of Schedule I of the Limitation Act (vide *Shravan Shahasing Patil* v. *Fattu*[3].) Learned counsel for the lessee-appellant, of course, did not challenge the correctness of any of these decisions. Their attempt was to distinguish them all on the ground that what was laid down in those cases was that the possession of a tenant after the expiry of the term of the lease was " wrongful ".

It is quite true that such a person is liable to be ejected by due process of law. He is also liable for mesne profits. But it cannot be said that his possession was unlawful. So the argument ran.

It cannot be denied that there is considerable force in the contention based on the difference—subtle, but essential—between wrongful possession and unlawful possession. The question is how the expression "lawful possession", which occurs in rule 13, should be construed in the relevant context. It must not be overlooked that the Madaras Cinemas (Regulation) Rules were framed in exercise of the powers conferred by the Madras Cinemas (Regulation) Act, 1955. That Act itself was intended to provide for the regulation of exhibitions. Under section 3 of that Act, no person can give an exhibition by means of a cinematograph elsewhere than in a place licensed under the Act and subject to conditions and restrictions imposed by such licence. Section 5 enumerates the matters, to which the licensing authority must have regard in deciding whether to grant or refuse a licence. These matters are (*a*) the interest of the public generally, (*b*), the status and previous experience of the applicant, (*c*) the suitability of the place, (*d*) the adequacy of existing theatres, (*e*) the benefit to the concerned locality, and (*f*) the possession by the applicant of other theatres. Every licence granted under the Act is to the person to whom it is granted. Sub-section (7) of section 5 provides for an appeal from the order of the licensing authority refusing to grant a licence.

Obviously, the grant of a licence does not by itself confer any proprietary right on the licensee. A licence is not proof of title. The licensing authority who is an executive officer does not have the requisite power to adjudicate on disputes as to title. Rule 13 makes it necessary for the applicant for the licence, if he is the owner of the site, building and equipment, to produce to the licensing authority the necessary records relating to his ownership and possession thereof. It is for the licensing authority to be satisfied on the records whether the licence should be granted to the applicant as the owner. If the licensing authority entertains any doubt as to the ownership of the applicant, he may refuse to grant the licence ; but such refusal would not have any bearing on the actual title of the applicant. To give an instance ; supposing *A* applies for a licence and he produces a sale-deed relating to the premises standing in the name of a third party, but asserts that it is really benami for him, the licensing authority may well refuse to grant the licence. He is not bound to ascertain whether the person in whose name the sale-deed stands is the benamidar of the applicant. Or, to take another instance ; suppose *A*, an applicant, claims a property as the legatee under a registered will, which is produced before the licensing authority. Even if another person were to dispute the genuineness of the will, the licensing authority may well be satisfied with the registered will and grant the applicant a licence. It appears to us that the same consideration would apply to possession. Here, the rule expressly says that the evidence, which the applicant has to adduce to show that he is in lawful possession of the site, building and equipment, should be "to the satisfaction of the licensing authority". If an applicant produces certain documentary

1. (1922) 43 M.L.J. 35: L.R. 49 I.A. 81 : I. L.R. 1 Pat. 340 (P.C.).
2. (1929) 58 M.L.J. 215 : L.R. 57 I.A. 105: I.L.R. 9 Pat. 621 (P.C.).
3. (1926) 98 I.C. 911.

evidence, but the Commissioner is not satisfied, on such evidence that the applicant is in lawful possession of the site, building and equipment, he can refuse to grant the licence. Will it be open to this Court in the exercise of special jurisdiction conferred by Article 226 of the Constitution to say that the licensing authority should have been satisfied by the documentary evidence produced, as showing that the applicant is in lawful possession of the premises and equipment? There may be, we concede, exceptional cases where this Court might hold that the order of the licensing authority is *prima facie* perverse. To give an extreme example : suppose there is a judgment of the Supreme Court, declaring that the applicant is in lawful possession of the premises and that judgment is produced before the licensing authority, but the authority, nevertheless, says that he is not satisfied that the applicant is in lawful possession, this Court would interfere. Barring such exceptional cases, we think that it does not lie within the province of this Court to examine the correctness of the view taken by the licensing authority in the case of each applicant as to whether he is or is not in lawful posssion of the premises and equipment.

In the present case, admittedly, the lease in favour of the appellant has expired. There is a decision of this Court in *Raja Chetti* v. *Jagannathadas*,[1] according to which, *prima facie*, the appellant may not be entitled to the benefit of the provisions of Madras Buildings (Lease and Rent Control) Act. The appellant will therefore be a person who can well be described as one not legally entitled to be in possession. It is one thing to say that he cannot be ousted from the premises without recourse to a Court of Law ; but it is another thing to say that he is lawfully entitled to be in possession.

If, in this case, the licensing authority had actually renewed the license in favour of the appellant, we would not have interfered. In W.P. No. 608 of 1959, Balakrishna Ayyar, J., refused to interfere, at the instance of the owner of a cinema theatre, with an order of the licensing authority, granting a temporary licence to the lessee whose lease had expired. The learned Judge did not think it necessary to decide whether the possession of a lessee, whose term had expired, but had not surrendered possession to his landlord, is lawful or not. He held that, even if the continued possession was not lawful, the owners had no legal right which was infringed by the grant of the licence by the licensing authority. The learned Judge pointed out that the only manner in which the lessors could get possession would be by filing a suit in a competent civil Court and that the owners could not be allowed to bypass the ordinary civil Courts while resorting to put pressure on the erstwhile tenant in an oblique way. This order of Balakrishna Ayyar, J., was confirmed by a Division Bench, to which one of us was a party, on the ground that the owners had no legal right which was infringed by the impugned order of the Collector. In the instant case, it is a case of licensing authority refusing to grant a licence. Unless we can hold that he was compelled by the relevant statutory provisions to grant the licence to the appellant we cannot issue a writ of *mandamus*, directing the Commissioner of Police, to renew the licence.

It is unfortunate that the result would be the closure of the theatre till the question of possession is decided by a competent Court of Law. The appellant would not be able to exhibit films at the theatre without a licence. Nor can the owner exhibit, because she would not be entitled to a licence unless she is in possession. But, on this ground, we do not think that we would be justified in directing the Commissioner to issue the licence to the appellant. The appeal (W.A. No. 151 of 1959) must therefore be dismissed ; but, in the circumstances, there will be no order as to costs.

Writ Appeals Nos. 160 to 162 of 1959, which arise out of three connected W.Ps. Nos. 969 to 971 of 1959, relate to Murugan Talkies. The material facts are more or less similar to those in W.A. No. 151 of 1959. There is, however, one fact which is peculiar to this case. The appellant obtained a lease of the premises only, that is, the theatre, from one Paramasiva Mudaliar, impleaded as respondent 3 to the petitions. But the equipment belonged to Rajeswari Ammal, a sister

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1. (1949) 2 M.L.J. 694.

of Paramasiva Mudaliar, impleaded as respondent 4 in the petition, and the appellant obtained the use of this equipment by an agreement of hire entered into between her (Krishnaveni Ammal) and Rajeswari Ammal.

The principle of our decision in W.A. No. 151 of 1959 would equally apply to this case on the finding that there was a tripartite agreement, which practically made the lease a composite lease of the theatre, and the equipment. If that be not so, there is another ground on which the appellant must fail. The appellant is entitled to the use of the equipment only under the agreement of hire, which came to an end on 15th November, 1959. So far as we are aware, there is no statutory provision for extension of the term of hire, similar to the provisions of the Madras Buildings (Lease and Rent Control) Act. The possession of the equipment beyond the date of the hire agreement without the consent of the owner would be *per se* unlawful. Rule 13 requires that the applicant should be in lawful possession not only of the site and the building, but also of the equipment. Clearly, the appellant cannot be said to be in lawful possession of the equipment after 15th November, 1959. She cannot therefore satisfy the condition required by that rule. It follows that she is not entitled to any relief by way of *mandamus* or otherwise either against the Commissioner of Police or against the Board of Revenue, or against the Chief Electrical Inspector. The appeals are therefore dismissed, but there will be no order as to costs.

R.M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

State of Madras by Collector of Thanjavur .. *Appellant**

v.

Ramanatha Rao and another .. *Respondents.*

Hindu Law—Inheritance—Mother's mother's sister's son—Mathru Bandhu—Last proprietor being an illegitimate son—Relationship of Mathru Bandhu not affected—Law of Escheat —Absence of heirs of the last holder—Onus on the State to establish.

The plaintiff was the mathru bandhu of the last holder being his mother's mother's sister's son. This relationship is not in any way affected by the last holder being an illegitimate son born to a permanently kept woman. The relationship is traced only through the mother of the illegitimate son and not through his putative father.

The onus lies on the State to show that the last proprietor died without an heir in order to enable the State to take by escheat the properties left by him.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Ramaswami Gounder, dated 11th day of October, 1955, in Appeal No. 523 of 1951 preferred against the decree of the Court of the Subordinate Judge of Mayuram, in Original Suit No. 47 of 1949.

T. P. Gopalakrishnan, for the Government Pleader (*K. Veeraswami*) and *V. Ramaswami*, for Appellant.

K. V. Venkatasubramania Iyer and *T. S. Kuppuswami Iyer*, for Respondent.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—This appeal is against the judgment and decree of our learned brother, Ramaswami Gounder, J., dated 11th October, 1955, in A.S. No. 523 of 1951 reversing the decree and judgment passed by the learned Subordinate Judge of Mayuram in O. S. No. 47 of 1949. The State of Madras, represented by the Collector of Tanjore, is the appellant.

The first respondent to this appeal, Ramanatha Rao, is the son of one Kasinatha Rao. He along with his brother, Krishnajee Rao, claimed to be entitled to the properties in

* L.P.A. No. 26 of 1956. 18th December, 1959. (27th Agrahayana, 1881, Saka).

their capacity as the *mathru bandus* of Jagannathan, the last male owner of the suit property. The said Jagannathan was an illegitimate son of Singaravelu by his concubine, one Dhanabagyathammal. The said Jagannathan died on 1st August, 1945, leaving certain lands and houses and movable properties situate mostly in the village of Manandakudi in the Ayyampettai Vattam and also in Marudavancheri. These properties originally belonged to Singaravelu Pillai, who died on the 10th February, 1943, leaving a divided brother, Krishnaswami Pillai, besides the illegitimate son, Jagannathan. In O.S. No. 60 of 1943, on the file of the District Munsif of Mayuram, the said Jagannathan claimed title to and possession of the properties which formed the subject-matter of the suit, out of which this appeal has arisen. The suit was directed against the said Krishnaswami Pillai, the divided brother of Singaravelu Pillai and his lessees. That suit was decreed in favour of the said Jagannathan on the 31st January, 1944, as evidenced by the copy of the judgment marked Exhibit B-2 in the suit. The decree passed in the said suit appears to have been confirmed on appeal in A.S. No. 50 of 1944 on the file of the Court of the Subordinate Judge of Mayuram. The judgment in the appeal is marked as Exhibit B-3 in the suit. The appellate decree also became final by reason of the dismissal of the Second Appeal preferred by the appellant in that First Appeal, and Jagannathan became entitled to and was in possession and enjoyment of the properties decreed in his favour till he was murdered on 1st August, 1945. He died unmarried and left no issues.

After Jagannathan's death, the question arose as to who were his heirs entitled to succeed to the properties, which he, as the illegitimate son inherited from his putative father, Singaravelu. Ramanatha Rao, the first respondent, claimed to be Dhanabagyathammal's mother's sister's son. The said Dhanabagyathammal, as already stated, was the concubine of Singaravelu Pillai, and the mother of Jagannathan. On the death of Jagannathan, Ramanatha Rao performed the obsequies, and issued printed invitations for the ceremonies connected with the deceased. He took residence in the house left by Jagannathan and obtained ration card therefor. He also got into possession of the other properties. He leased out the lands of one Kunchithapatham Pillai, the undivided son of Murugayya Pillai, the Village Munsif of Ayyampettai Vattam, under a lease deed, Exhibit A-6, dated 19th September, 1945, for a period of seven years. The said Jagannathan also paid kist for the lands and obtained kist receipts, Exhibits A-7 and A-19 to A-24. Ramanatha Rao and his brother, the two respondents in this appeal, are the sons of one Rama Bai, wife of Kasinatha Rao. According to them, Rama Bai had a sister by name Kannammal, wife of one Madhava Rao. They had an only daughter, *viz.*, Dhanabagyam, the mother of Jagannathan, and the concubine of Singaravelu. It is in this way that the two respondents in this appeal claimed to be the heirs of Jagannathan as his *mathru bandus*, *i.e.*, they are Jagannathan's mother's mother's sister's sons.

When such was the case, the State Government would appear to have started escheat proceedings against the properties left by Jagannathan, and after making enquiries, declared by an order, G.O. No. 1320, Home Department, dated 9th April, 1948, published in the Tanjore Gazette and also in the newspaper, "Yadarthavachani", Exhibit A-10, that the properties of the late Jagannathan had escheated to the Government.

Thereupon, the lessee of Ramanatha Rao, *viz.*, Kunchithapatham, surrendered possession of the lands to the Government on the 17th September, 1948. It transpires that the Government leased out the lands, once again, to Kunchithapatham, himself, and one Singaram Pillai under a deed, Exhibit B-4, on 24th September, 1948. Aggrieved by the order and by the subsequent action of the Government, Ramanatha Rao notified to the Government of his proposed suit for recovery of the properties. On 7th May, 1949, the movables in the house of Jagannathan were also sold in auction by the Government.

In the meanwhile, there seems to have been proceedings against the first respondent by the creditors of Jagannathan for recovery of the debts due by Jagannathan from out of the assets left by him. These suits were Small Cause Suits, Nos. 18, 19 and 226 of 1946 on the file of the District Munsif's Court, Mayuram. Decrees

were obtained, and there have been execution proceedings and some of the properties of Jagannathan were also sold in public auction, and purchased by one Nataraja Pillai, another son of the Village Munsif, Murugayya Pillai of Ayyampettai Vattam. It is not necessary to refer in detail to these proceedings.

After the expiry of the notice under section 80, Civil Procedure Code, the said Ramanatha Rao filed O.S. No. 47 of 1949 against the Government making his brother Krishnajee Rao, the second defendant and two others as defendants 3 and 4. The State Government also filed a suit, O.S. No. 74 of 1949 against the Village Munsif, Murugayya Pillai and his two undivided sons, to recover a sum of Rs. 1,045-14-3 representing the income and profits realised by them from the lands leased to them, for the period 1st August, 1945 to 17th September, 1948, after deducting the kist, etc. We are not concerned with the suit filed by the Government in this appeal, though both the suits were tried together and the learned Subordinate Judge of Mayuram disposed of both the suits by a common judgment. In O.S. No. 47 of 1949, Ramanatha Rao sued the Government for a declaration that he and his younger brother, Krishnajee Rao, were entitled as the heirs of the late Jagannathan to his properties described in Schedules A and B to the plaint, and also to certain movables and monies in Court described in Schedule C to the plaint. Ramanatha Rao prayed for a decree for possession of the properties with mesne profits subsequent to the suit.

Ramanatha Rao's case, in particular, was that he and his younger brother, the second respondent, were the sons of Rama Bai, who was Jagannatha's mother's mother's sister. That Jagannathan having died unmarried and issueless, his properties devolved upon Ramanatha Rao and his brother as his *mathru bandus*. Ramanatha Rao claimed that he had performed the funeral obsequies; that he was in possession of and enjoyment of the properties left by Jagannathan ; that he was actually living in the house left by Jagannathan; that he had exercised acts of ownership in respect of the lands by leasing them out to Kunchithapatham Pillai, the son of the Village Munsif; that his right was recognised in Court proceedings in Small Cause Suits Nos. 18 and 19 of 1946 and in execution proceedings of O.S. No. 285 of 1945 on the file of the District Munsif's Court, Mayuram. He contended that the properties could not be taken over by the Government under the Law of Escheat ; the rejection of his claim by the Collector and the Government was illegal ; that his house was also wrongfully sealed by the Tashsildar, and his efforts to get the seal removed were all of no avail to him.

In the suit, the State Government pleaded that Jagannathan died without an heir, that neither the first nor the second respondents were related to Jagannathan's mother, Dhanabagyam in any way; that even assuming that they were so related, as the said Jagannathan was an illegitimate son of Singaravelu Pillai, his paternal or maternal relations could not inherit to his estate ; that the first and second respondents were not heirs of Jagannathan according to Hindu Law, and, threfore, could not claim his properties. Further, the complaint of the State Government was that the first and second respondents were put up as the heirs to the last male holder, Jagannathan, by the Village Headman of Ayyampettai Vattam and his sons with a view to continue to enjoy the properties themselves ; that the said Village Munsif and his sons had surrendered the property to the Government ; and the heirship of the first and second respondents was not recognised in any prior suit, and the claim of the respondents being fraudulent and collusive, the respondents could not claim any right or title therein ; that the sale in public auction held by the Government was valid, and that the plaintiff or his brother were not entitled to any relief. The second respondent, as could be expected, remained *ex parte*.

Defendants 3 and 4 were impleaded as the mortgagee and purchaser in Court auction respectively, of certain items of properties left by Jagannathan. The third defendant remained *ex parte*, while the fourth defendant contended that the sale in his favour of items 1 to 7 of B Schedule was valid, that the plaintiff was estopped by his own conduct from disputing it ; that he was not a necessary party to the suit, and that the plaintiff was not entitled to recover possession of the land from him. But, later on the 25th July, 1950, the plaintiff prayed that the defendants 3 and 4 may be

struck off the records, and they were struck off accordingly, and they do not figure any more in these proceedings.

The learned Subordinate Judge framed three issues on the pleadings, the material amongst them being whether the plaintiff and the second defendant were the nearest heirs to the deceased Jagannathan, and whether they were entitled to the suit properties. Both the suits having been tried together Exhibits A-1 to A-30 were marked for the plaintiff, who examined himself his mother, Rama Bai and five other witnesses, in addition to the first defendant in O.S. No. 74 of 1949, who was examined as P.W. 8. On behalf of the Government, nearly 14 exhibits, *viz.*, B-1 to B-14 were marked. No oral evidence was let in on behalf of the Government. Taking into consideration the oral and documentary evidence in the case, the learned Subordinate Judge found that the plaintiff, and the second respondent, his brother, were not the heirs to the deceased Jagannathan, and were, therefore, not entitled to the suit properties. In the result, he dismissed O.S. No. 47 of 1949 with costs, while decreeing O.S. No. 74 of 1949 also with costs. Aggrieved, by this decree and judgment the plaintiff preferred an appeal against the judgment and decree of the learned Subordinate Judge in this Court, being A.S. No. 523 of 1951. This appeal was heard and disposed of by our learned brother, Ramaswami Gounder, J., in an elaborate judgment. After discussing the evidence in the case as to the relationship of the plaintiff and his brother to the late Jagannathan and also the legal question as to whether by reason of such relationship the plaintiff and his brother were entitled to succeed to the estate left by Jagannathan, Ramaswami Gounder, J., came to the conclusion that the relationship between the late Jagannathan and his mother Dhanabahagathammal and the plaintiff and the second defendant was that of Dhanabhagyam's mother's sister's sons; that was a bhandu relationship, and that such relationship was complete. The claim of the plaintiff the learned Judge held was, through the mother as a cognatic relation, and holding that the plaintiff and the second defendant were entitled to suceed to the estate of Jagannathan, he reversed the decision of the learned Subordinate Judge, and allowed the appeal with costs in both the Courts, made payable by the Government. Against this decision, the State Government has preferred this Letters Patent Appeal.

The learned Government Pleader urged in the first instance, that there was no satisfactory documentary or oral evidence to establish the claim of the first respondent in this appeal that he and his brother were the *mathru bhandus* of Jagannathan, the last holder of the property. His contention was that the learned Judge had erred in accepting the evidence of P.Ws. 1 to 6 whose testimony had been described as artificial, unconvincing, discrepant and contradictory by the learned Subordinate Judge. We have been taken through the deposition of the witnesses, who gave evidence on behalf of the plaintiff and also through the discussion of the learned Judge of the recorded evidence of the plaintiff's witnesses. Having considered the evidence and the observations of the learned Judge, we do not think, that we can agree with the contention of the learned Government Pleader that the connecting link between the said Jagannathan and the plaintiff and his brother has not been established in the case. Exhibits A-1 to A-3 and also A-14 to A-18 have been referred to, in particular, by the learned Government Pleader, and he contended that these exhibits also did not prove to any extent that the plaintiff and his brother are in any way related to the late Jagannathan, the last holder of the properties. These exhibits are said to have been written by P.W. 7 at the instance of Jagannathan to his relations, and the person referred to as "Thambi" in these letters is said to be Jagannathan himself. In our opinion, these exhibits do lend support to the claim of the respondents that they are related to the late Jagannathan as *mathru bhandus*; and they are of no assitance to the appellant.

A point has been made that Jagannathan's putative father was a Maharatha Brahmin and his mother was a Vellala woman, and there could not have been any relationship between a Maharatha Brahmin and a Vellala woman. We do not see any force in this contention. In so far as Jagannathan was only an illegitimate son born to Dhanabagyam, and the evidence is to the effect that Dhanbagyam was the

daughter of Madhava Rao and Kannammal, and that the mother of the present respondents was Rama Bai and the sister of Kannammal, it is to be held that the link between Jagannathan and the present respondents through the mother of Jagannathan is well-established. The learned Government Pleader has taken exception to the observations of Ramaswami Gounder, J., that the onus lay on the State Government to show that the last proprietor died without any heir in order to enable the State Government to take by escheat the properties left by Jagannathan. The learned Judge has observed that the State Government had not chosen to lead any evidence, either denying the relationship set up by the respondents, or to show that the mother of Jagannathan was not the daughter of Madhava Rao and Kannammal ; but that she belonged to a Vellala family. We do not agree with the contention of the learned Government Pleader, when he urges that the observation of the learned Judge that the Government failed to adduce any evidence in support of its claim that the said Jagannathan died without any heirs and that the Government became entitled to take over the properties left by him under the Law of Escheat. We are of the opinion that the State Government ought to have established that the deceased Jagannathan died without heirs, before it could take proceedings under the Law of Escheat. The finding of the learned Judge Ramaswami Gounder, J., that the two responsents in this appeal are the deceased Jagannathan's mother's mother's sister's sons, and that, therefore, they were in the position of *mathru bhandus* of the deceased Jagannathan is quite warranted, and is well-founded.

In the next place, the learned Government Pleader urged that even if the respondents were held to be the sons of Jagannathans' mother's mother's sister, still under the Hindu Law, so far as the mother and her illegitimate children are concerned, there could be no cognatic heritable relationship enabling one to succeed to the properties of the other, and that that relationship cannot continue even amongst the descendants of such children. In other words, the learned Government Pleader contended that under the Hindu Law, collateral, or cognatic relations could not trace succession to an illegitimate son, and that heritable relationship could not be extended to collaterals in the case of illegitimate off springs. Reference has been made in this connection to Mayne's Hindu Law, paragraph 563, at page 677 and the learned Government Pleader urges that the ordinary rule of succession under the Hindu Law could not be applied to this case, because the deceased Jagannathan was not a legitimate son, but was only an illegitimate son of his mother, who was only a concubine of Singaravelu. While advancing this contention, it has to be observed, that the learned Government Pleader ignores the fact that the respondents in this appeal claim title to the properties left by Jagannathan not on the ground that they are agnatic relations, but because of their cognatic relationship with the said Jagannathan as *bhandus* through his mother. So long as Jagannathan and the present respondents are Hindus, and this fact is not denied, irrespective of the fact whether Jagannathan was legitimate or illegitimate, there could be no question that the principles of Hindu Law would be applicable to the present case, any succession to the estate left by Jagannathan will be governed only according to the principles of Hindu Law. In the present appeal, there is no question of respondents being illegitimate; but illegitimacy only applies to Jagannathan, and if the respondents have succeeded in establishing that they are in the line of heritable *bhandus*, there is no reason why they could not be entitled to succeed to the properties left by the deceased Jagannathan. The contention of the learned Government Pleader would appear to be that the Hindu Law of Succession could be applied only to the case of legitimate descendants and not to a case where the prepositus was an illegitimate issue. The passage relied upon by the learned Government Pleader in the commentary of the learned author Mayne on Hindu Law at page 677 is to the following effect :

> "The rules of inheritance relating to sapindas, samanodakas and bandhus are based upon marriage and legitimate descent. The illegitimate son of a Sudra is the only exception and his rights are also restricted".

It is difficult to see how this passage is of any assistance to the learned Government Pleader on the facts of the present case. The latter part of the passage states that the illegitimate son of a Sudra is the only exception to the general enunciation in the ear-

lier part. But the earlier part of the passage clearly says that the rules of inheritance relating to sapindas, samanodaks or *bhandhus* are based on marriage and legitimate descent. *Bhandhus* are certainly included in the list of heirs set out in the earlier part of the said passage relied upon by the learned Government Pleader. If Jagannathan was the son of Dhanabhagyam, the exclusively kept concubine of Singaravelu, there could be no question of any illegitimate descent between Dhanabhagyam and her son Jagannathan. It must be remembered that in the present case, the respondents claimed only through the mother's mother of Jagannathan, who was no other than the sister of the mother of the respondents. Though Jagannathan might have been the illegitimate son of Singaravelu, still it cannot by any means by contended that Jagannathan was not the son of Dhanabhagyam. The one certain factor is that Jagannathan was born to Dhanabagyam, and that being so, if Dhanabagyam could succeed to the estate left by Jagannathan as his mother, and if Dhanabagyam's properties could be succeeded to by her mother, then certainly on the death of Dhanabagyam's mother, if there are no other heirs, her sister and her children in succession will be entitled to inherit the properties of Jagannathan's mother's mother. That is how *bhandu* relationship comes into existence, and this relationship is not in any way affected by the last holder having been an illegitimate son of his putative father. Respondent's relationship is traced only through the mother of illegitimate son and not through his father. This distinction is very vital and the learned Government Pleader seems to overlook this in his argument that the Hindu Law of Succession could only be applied to the case of the legitimate descendants and not to the case where the prepositus has been an illegitimate issue. If this contention were to be accepted, then the rights of all *mathru bandhus* to succeed to the properties, left by the last holder will have to be scrapped out of the Hindu Law of Inheritance. On the other hand, not merely the text books on Hindu Law, but decisions of Courts in this country and the Privy Council, have all recognised the right of *mathru bandhus* to the properties of a Hindu who has left to no other heirs in the order of priority set out in the Hindu Law of Inhertitance, to succeed to his estate. In *Viswanatha Mudali* v. *Doraiswami Mudali*[1], a Bench of this Court has held applying the ruling in *Mayna Bai* v. *Uttaran*[2], that the legitimate descendants of two sons of a Hindu dancing woman are under the Hindu Law entitled to succeed to each other. The Bench has observed :

"Though the Sruthis and Smrithis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevalent even today. The Aryans when they settled in this part of India attempted to introduce their customs and laws but they were not completly successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentars like Yagnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Sruthis and Smrithis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people.........."

"In course of time the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of the country, who do not profess any distinctive faith like Muhammadanism or Christianity. The customary law was considered as an exception to that contained in the Sruthis and Smrithis. Under the loose terms 'Hindu' all classes of people are brought within the pale of 'Hindu Law' as expounded in the texts of the various Sruthis and Smrithis and their commentators. It therefore follows that people who have been born in India and who were of the Hindu faith and whose customs and manners are those of Hindus are governed by the Hindu Law.

In the case of a dancing woman or a Hindu prostitue, her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus and the Hindu Law therefore is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate".

This Bench further overruled the contentions that collateral relationship was traceable only through the father, in other words, that it was only in the case of agnatic

1. (1925) 49 M.L.J. 684 : I.L.R. 48 Mad. 944. 2. (1864) 2 M.H.C.R. 196.

relation that the principle was applicable, and that an illegitimate son cannot inherit to his father's collateral relations and that

"in the case of Muniappa Mudali and Muthuswami Mudali the father being unknown, agnatic relationship does not exist and therefore there can be no collateral succession among their descendants."

"It is well-settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the legitimate son of his father but can succeed only to his father and the father can succeed to him".

In *Jagannath Gir* v. *Sher Bahadur Singh*[1], it was held that a Hindu mother, governed by the Mitakshara Law, could inherit the estate of her illegitimate son, and that succession of the mother to her illegitimate son is in consonance with the scheme of inheritance under the Mitakshara Law. The Bench observed:

"Illegitimacy in the sense in which it is now understood was not at all recognised under the ancient Hindu Law, with its numerous varieties of marriages and still more numerous varieties of sons; and the question of illegitimacy could come in only if there was a legal impediment to marriage on account of relationshfp; or there was an infringement of the rule of caste by a woman of a higher caste marrying a man of a lower caste. But the position has been considerably modified in view of the fact that many forms of marriage and varieties of sons are obsolete, in the sense that, unless allowed by custom, they are not now recognised by law".

In *Meenakshi Ammal* v. *Ramaswami Joiser*[2], Vardachariar, J., has held

"that the general principle of the Hindu Law is undoubtedly to limit heirship to legitimate issue but in the case of illegitimate sons amongst Sudras, a special exception has been made by the texts. One should ordinarily have thought (on the analogy of the principle *ex pressio unious*) that this itself is a clear indication against recognising similar exceptions by way of analogy."

The learned appellate Judge has referred to the decision of this Court in *Meenakshi* v. *Murugayya*[3], wherein Krishnaswami Ayyangar, J., has observed as follows:

"I can find no warrant for holding that as a general rule the system of succession under the Mitakshara law is based on any relationship other than relationship through valid marriage and legitimate descent".

After referring to these observations, the learned Judge has considered the development of the law as it applied to the cognatic blood relationship that exists between the mother and the illegitimate child, and has come to the conclusion that if succession is claimed through cognatic relationsip, there could be no difficulty in accepting such a claim. We are in agreement with the reasoning of the learned appellate Judge which is in complete accord and consonance with the trend of the decisions which recognise the line of heris known in Hindu Law as *mathru bandhus*.

Our attention has been invited to the decisions in *Venkata Veeraraghavayya* v. v. *Sreenivasa Rao*[4], *Yendamuri Veeranna* v. *Yendamuri Satyam and others*[5], *Sadhu* v. *Shanker Rao*[6], *Pandurang Ganpatrao* v. *Administrator of Bombay*[7], *Chellamma* v. *Subba Rao*[8], and *Venkanna* v. *Narayanamma*[9] as touching the point now argued before us.

In *Venkata Veeraraghavayya* v. *Sreenivasa Rao*[4], Chandrasekhara Iyer, J., held that an illegitimate son had no right to trace succession collaterally, and that he could not be regarded as heir to the estate of the last male holder and his suit brought on that footing had to be dismissed. This decision does not have much application to the facts of the present case.

In *Yendamuri Veeranna* v. *Yendamuri Satyam and others*[5], Horwill, J., has held that when under the Hindu Law a daughter or a son is referred to, the law-givers have contemplated only a legitimate son or a legitimate daughter.

"Illegitimate children have no rights at all in succession except in the two specified special classes of cases. Hence an illegitimate son of a daughter cannot be considered under the Hindu Law as the daughter's son and would not be entitled to the rights and privileges of a daughter's son".

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1. (1934) I.L.R. 57 All. 85.
2. (1937) 1 M.L.J. 28.
3. (1940) 1 M.L.J. 288 : I.L.R. (1940) Mad. 739.
4. (1945) 1 M.L.J. 288.
5. (1947) 1 M.L.J. 301.
6. I.L.R. (1955) Nag. 467.
7. I.L.R. (1953) Bom. 435.
8. (1953) 1 M.L.J. 358 : I.L.R. (1953) Mad. 741.
9. (1953) 2 M.L.J. 652 : I.L.R. (1953) Mad. 1235.

We do not think that the facts in this case are the same as in the case before us. There fore this decision is not of any great relevancy to the question to be decided in the present case. In *Pandurang Ganpatrao* v. *Administrator of Bombay*[1], it was decided that under the Hindu Law, collaterals of the mother are not entitled to succeed to her illegitimate daughters. The case before us is not however of a collateral of the mother seeking to succeed to her illegitimate daughters. In the present case on the death of Dhanabagyathammal her mother's mother succeeded to her estate and on her death her sister and in turn her sister's son would be entitled to succeed to the estate left by her. As already observed this is a case of succession being claimed by a *mathru bandhu* and provision is specifically made in Hindu Law recognising the claims of *mathru bandhus*. Only, if these respondents are declared not to be *mathru bandhus*, then the question of their not being entitled to the estate would arise. But in so far as we have held that these respondents are *mathru bandhus*, their claim cannot be resisted by the appellant.

In *Chellamma* v. *Subba Rao*[2], to which one of us was a party it was held

> " that members of the dancing girl community who adopt the Hindu faith and Hindu customs and manners must be treated as persons governed by the ordinary Hindu law, but on account of the special kind of life led by them which is in important respects inconsistent with Hindu dharma on which ultimately Hindu Law is based, they are governed largely by custom and usage often not in consonance with Hindu Law. When there is no proof of a custom directly applicable to any particular case of disputed possession, the general rules of Hindu Law may be applied by analogy as rules of justice and equity. It cannot be said that a girl adopted by a woman of the dancing girl community becomes entitled to all rights of collateral succession unless there is a custom pleaded and proved to that effect ".

We are afraid, the principle of the above decision does not help to any extent the learned Government Pleader who contests the right of the *mathru bandhus* like the respondents to succeed to the estate of their mother's mother's sister.

In *Sadhu* v. *Shanker Rao*[3], the decision was to the effect that the illegitimate son of a daughter is not entitled to inherit the stridhanam property of his maternal grandmother, either on the analogy of the principles of Hindu Law or on the special text, or on the ground of justice, equity and good conscience. We do not think that the facts of this case are '*ad idem*' to the facts of the present case. Even this decision has no application to the point that is now under discussion.

In *Venkanna* v. *Narayanamma*[4], a Bench of this Court held that where a married woman died leaving behind her a sole illegitimate daughter and certain stridhana properties the illegitimate daughter would succeed to the stridhana properties in preference to the brother of the husband of the deceased. It further held that illegitimacy was no bar to the succession to a woman's stridhana.

Neither the language of the Hindu Law texts, nor the application of any rule of interpretation would justify the exclusion of any illegitimate children of a Hindu married woman from succeeding to their mother's estate. The Bench also held that as between a legitimate and an illegitimate daughter, even if a legitimate daughter survived, she would not exclude the illegitimate daughter but would only be entitled to share equally with her. The Bench upheld the view taken in *Angammal* v. *Venkata Reddy*[5], and that decision was not fully considered in *Meenakshi* v. *Murugayya*[6], and *Meenakshi Ammal* v. *Ramaswami Josier*[7]. We are inclined to agree with the view held by this Bench and it makes the nearest approach to the facts of the present case.

In the order of succession among bandhus and particularly *mathru bandhus* under Mitakshara Law as given in Mulla's Hindu Law the mother's mother's sister's son is mentioned as a heir being item 8, in the line of succession, as also in Mayne's Hindu Law, 11th Edition, at page 969 the 8th item relates to the mother's mother's sister's son, who is entitled to succeed as a *mathru bandhu*.

Mr. K. V. Venkatasubramania Iyer referred us to a text of Satatapa where among the 9 cognate relations, the 8th is said to be the mother's mother's sister's

1. I.L.R. (1953) Bom. 435.
2. (1953) 1 M.L.J. 358 : I.L.R. (1953) Mad. 741.
3. I.L.R. (1955) Nag. 467.
4. (1953) 2 M.L.J. 652 : I.L.R. (1953) Mad. 1235.
5. (1902) I.L.R 26 Mad. 509.
6. (1940) 1 M.L.J. 288 : I.L.R. (1940) Mad. 739.
7. (1937)) 1 M.L.J. 28.

son entitled to succeed to the estate left by a female. The question then is whether this mother's mother's sister's son could be outlawed on the ground that the last owner of the properties died without leaving any heirs to succeed in the face of the trend of the decisions referred to above and also the commentaries on Hindu Law as cited by the learned counsel for the respondents. As has been observed by the learned appellate Judge and also as stated in the Commentary of Mulla at page 155, in paragraph 59 of the 12th edition, where the State claims by escheat, the onus lies on the State to show that the last proprietor died without heirs, and since in our opinion the State Government has failed to establish that the last proprietor died without an heir, we are inclined to agree with the learned appellate Judge that the respondents are entitled to succeed in the suit, as they are the *mathru bandhus* of the last holder of the property.

In this view we agree with the learned appellate Judge and hold that this appeal deserves to be dismissed, and it is accordingly dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Kuppa Goundar .. *Petitioner**

v.

Joint Sub-Registrar, III, Salem and others .. *Respondents.*

Registration Act (XVI of 1908), section 75 (4)—Power of Sub-Registrar in summoning witnesses—Scope and extent of.

The words 'as if he were a civil Court', in section 75 (4) of the Registration Act is very wide and would attract all the provisions of Order 16, rule 14 of the Civil Procedure Code, 1908, relating to summoning and enforcing attendence of witnesses. Hence a Sub-Registrar has jurisdiction to summon any witness, of his own accord, in an enquiry in respect of compulsory registration of document, if he feels that the evidence of the witness will be necessary for the decision of the dispute.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings in O.E. No. 1 of 1959 on the file of the Joint Sub-Registrar, III, Salem (1st Respondent herein), and quash the order, dated 28th November, 1959 and made therein.

K. S. Ramamurthi and *O. K. Ramalingam*, for Petitioner.

Respondents not represented.

The Court made the following

ORDER.—This is a writ petition for the issue of a writ of *certiorari* to quash the order of the Joint Sub-Registrar, III, Salem, dated 28th November, 1959, passed under the following circumstances :

One Ponnuswami Goundar filed Original Enquiry No. 1 of 1959 before the Joint Sub-Registrar, III, Salem, claiming compulsory registration of a mortgage document, dated 12th February, 1959, under section 73 of the Indian Registration Act. His case was that the mortgage document was executed by one Ellappa Goundar and his brother, Kuppa Goundan (Ellappa Goundan also acting as guardian of his minor son, Thangavelu) having received consideration of Rs. 4,600 in cash. It was stated by this Ponnuswami Goundan that after receiving consideration and after executing the mortgage bond referred to, the executants promised to have the document registered on or before 16th February, 1959. Finding that the executants did not keep up their promise and fulfil their obligation to have the document registered, Ponnuswami issued a registered notice through his lawyer on 30th March, 1959, which was received by the executants on 6th April, 1959. No reply was sent to this notice. Thereafter Ponnuswami filed a petition for compulsory registration on 14th May, 1959, before the Joint Sub-Registrar, III, Salem, who issued summons to the executants to appear before him on 26th May, 1959, to admit the document and have it registered. The

*W.P. No. 1217 of 1959.

5th January, 1960.
(15th Pausa, 1881—Saka).

respondents received the summons but failed to appear before the Joint Sub-Registrar. Alleging that the executants wilfully absented themselves before the Joint Sub-Registrar Ponnuswami filed an original petition, O.E. No. 1 of 1959, in accordance with the provisions of the Indian Registration Act seeking an enquiry into the matter as provideed for therein.

Ellappan and Kuppa Goundan the executants of the mortgage bond were the respondents in O.E. No. 1 of 1959 which as stated above was instituted by Ponnuswami. The executants, however, denied the execution of the document as alleged by Ponnuswami and also denied receipt of consideration and filed counter-statements before the Joint Sub-Registrar. Therefore an enquiry became necessary as to whether the mortgage document was executed by the executants as alleged by the mortgagee Ponnuswami. The Joint Sub-Registrar held an enquiry in the course of which he examined Ponnuswami, as P.W. 1 and Ramaswami and Sennimalai as P.Ws. 2 and 3. One of the executants Kuppa Goundan was examined as R.W. 1. He denied having executed the document or of having received a sum of Rs. 4,600 alleged to have been paid. The Joint Sub-Registrar further examined the Karnam of Nallikalpatti the scribe of the documents and the Karnam of Parapatti one of the attestors to the documents as Court witnesses 1 and 2. It is not necessary to refer to the substance of the evidence tendered before the Joint Sub-Registrar in the course of his enquiry.

During the enquiry the Joint Sub-Registrar felt that having regard to the contention raised before him the evidence of one Sennimalai father-in-law of Ponnuswami, the person in whose favour the mortgage was executed was necessary to which course there was apparently opposition on the part of Kuppa Goundan the joint executant of the mortgage document. As neither side was willing to his being examined the Joint Sub-Registrar thought it fit to issue summons to Senninalai to give evidence before him as Court witness. The order of the Joint Sub-Registrar in so far as it is material is as follows :

> "The Court witness Sennimalai is a very important man in connection with this case ; but he has not been examined either by the applicant or the counter-petitioner. I consider his evidence important to find out the truth in this case."

Kuppa Goundan feeling himself aggrieved by the said order of the Joint Sub-Regitrar has filed the above writ petition challenging the jurisdiction of the Joint Sub-Registrar to pass such an order.

The learned Advocate for the petitioner contends that the jurisdiction of the Joint Sub-Registrar to hold the enquiry in respect of compulsory registration of the document presented before him is circumscribed by the provisions of sections 36 and 75 (4) of the Indian Registration Act and that having regard to the said provisions, he has no power to examine any witness of his own styled as Court witness.

Section 36 reads as follows :

> "If any person presenting any document for registration or claiming under any document, which is capable of being so presented, desires the appearance of any person whose presence or testimony is necessary for the registration of such document the registering officer may in his discretion, call upon such officer or Court as the (State) Government directs in this behalf to issue a summons requiring him to appear at the registration office, either in person or by duly authorised agent, as in the summons may be mentioned, and at a time named therein."

Section 75 (4) is in these terms :—

> "The Registrar may for the purpose of any enquiry under section 74 summon and enforce the attendance of witnesses, and compel them to give evidence, as if he were a civil Court, and he may also direct by whom the whole or any part of the costs of any such enquiry shall be paid and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908.

The contention raised is that section 36 of the Registration Act provides only for examining all witnesses whose presence or testimony is necessary for the registration of such document according to the desire of the person presenting the document for registration and that it does not provide for witnesses being examined at the instance of the Officer before whom the document is presented for registration. The language of section 75 (4) of the Act is wide and it enables the Registrar to summon and enforce the attendance of witnesses as if he were a civil Court. But the contention on

behalf of the petitioner is that this section only provides for the mode of summoning and enforcing the attendance of witnesses and does not prescribe the jurisdiction of the officer to summon witnesses.

The power of the Civil Court to summon witnesses is contained in Order 16, rule 14 of the Civil Procedure Code. Rule 14 of Order 16 of the Civil Procedure Code provides that a Court may of its own motion and accord summon witnesses at any time as it thinks fit or necessary. The contention of the learned counsel for the petitioner is that the Joint Sub-Registrar is not a civil Court to whom the provisions of the Civil Procedure Code can be attracted. This contention overlooks the specific words in section 75 (4) of the Registration Act, namely as if he were a civil Court which show that the powers exercisable by the enquiring Registrar in respect of summoning and examining witnesses are exactly those that are conferred upon a civil Court. Otherwise the significance of the words "As if he were a civil Court" will be entirely lost. I am of opinion that the words "As if he were a civil Court" occurring in section 75 (4) of the Registration Act attracts all the provisions of the Civil Procedure Code in respect of summoning and enforcing attendance of witnesses and that, therefore, the provisions of Order 16, rule 14, Civil Procedure Code, referred to above apply with full force to any enquiry before the Sub-Registrar for compulsory registration of documents presented before him.

Assuming, however, that the provisions of the Civil Procedure Code do not in terms apply in respect of the aforesaid enquiry the question still remains whether the enquiring officer is in any way precluded from examining witnesses whom he considers necessary or material for the purpose of investigating the truth. No doubt, a tribunal functioning under a special enactment has got its jurisdiction circumscribed by the provisions of the Act creating it but this delimitation of jurisdiction is only with regard to matters to be decided and adjudicated upon by it. It cannot relate to the mode of the enquiry which the Tribunal can conduct to enable it to function under the special enactment. Quasi-judicial tribunals entrusted with the duties of decision and adjudication have really an uncharted field of enquiry which they can resort to untrammelled by strict rules of procedure or evidence. That does not mean that they can hold a roving enquiry or act contrary to the rules of natural justice. Such tribunals are free to function within the limits of their jurisdiction without being obliged to follow any particular or special form of enquiry or procedure. There is no prohibition under the Indian Registration Act against the Joint Sub-Registrar summoning witnesses of his own accord, in his anxiety to find out the truth. In fact in the present case the Joint Sub-Registrar has categorically observed that he feels the necessity for examining Sennimalai to find out the truth. It would be a travesty of justice if he cannot do so by his being told that he must find out the truth of the case only through the evidence of witnesses whom the parties choose to place before him.

I am of opinion that the Joint Sub-Registrar has not in any way exceeded his jurisdiction by holding that Sennimalai should be examined as a Court witness. The statutory provision of the Indian Registration Act and the wide and free scope of enquiry permissible to tribunals in general confer such jurisdiction upon him. I, therefore, overrule this contention raised on behalf of the petitioner. The Writ Petition fails and is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore .. *Petitioner**

v.

Messrs. S. V. Shanmugham & Co., Tiruchirapalli .. *Respondents.*

Madras General Sales Tax Rules (1939), *rule* 13 (1)—*Assessment of turnover exceeding Rs.* 20,000—*Order by Deputy Commercial Tax Officer under rule* 17 (1) *of the Rules—Appeal to Commercial Tax Officer—Maintainability—" Original " order of assessment—Sections* 2 (*a*) (2) *and* 11, *Madras General Sales Tax Act* (*IX of* 1939).

Rules 13 (1) of the Madras General Sales Tax Rules (1939) specifically makes any original order of an assessing authority appealable to the Commercial Tax Officer. An order passed under rule 17 (1) of the Rules in a case of turnover exceeding Rs. 20,000, is an "Original order" of assessment and when passed by the Deputy Commercial Tax Officer who is the assessing authority under section 21 (*a*) (2) of the Madras General Sales Tax Act, an appeal from that order lies to the Commercial Tax Officer under rule 13 (1), when there is nothing to indicate that any of the provisions of section 11 of the Act barred the appeal by the assessee.

Petition under section 12-B (1) of the Madras General Sales Tax Act praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 10th April, 1957 and made in Tribunal Appeal No. 6 of 1957 (Appeal No. 150 of 1956-57, Commercial Tax Officer, Tiruchirapalli).

G. Ramanujam for the Additional Government Pleader (*M. M. Ismail*) on behalf of the Petitioner.

K. Srinivasan and *D. S. Meenakshisundaram*, for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee-respondent was assessed to tax for the assessment year 1953-54 by the Deputy Commercial Tax Officer, who was the " assessing authority ", the turnover exceeded Rs. 20,000. Subsequently, the Deputy Commercial Tax Officer took action under rule 17 (1) of the Madras General Sales Tax Rules, (1939) and assessed the assessee afresh to include both the original turnover and the turnover that had escaped assessment then. The turnover on which the assessee was ultimately assessed was Rs. 1,89,038. Against the revised order of assessment the assessee appealed to the Commercial Tax Officer, who rejected the appeal as not maintainable. The assessee appealed to the Tribunal against the order of the Commercial Tax Officer. The Tribunal held that the appeal to the Commercial Tax Officer was maintainable, and remanded the appeal for disposal afresh by the Commercial Tax Officer. The State challenged the correctness of the order of the Appellate Tribunal by this application preferred under section 12 (*b*), of the Sales-tax Act.

It is quite enough for us to rest our decision on rule 13 (1) of the Madras General Sales Tax Rules, though that was not specifically adverted to by the Appellate Tribunal. Rule 13 (1) runs :

" Subject to the provisions of section 11, any person aggrieved by any original order of an assessing authority may appeal to the Commercial Tax Officer concerned ".

It is not necessary to set out the Proviso or the other sub-sections of rule 13. Rule 13 (1) specifically makes any ' original ' order of an assessing authority appealable. The order passed under rule 17 (1) is an original order of assessment, and in this case it is an order of the assessing authority, because as we have pointed out, it was the Deputy Commercial Tax Officer who came within the scope of the definition of " assessing authority " in section 2 (*a*) (2). Therefore, the order passed under rule

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* T.R.C. No. 62 of 1957. 30th November, 1959. (9th day of Agrayana, 1881—Saka).

17 (1) was appealable under rule 13 (1), subject of course, to the other conditions specified in section 11. There was certainly nothing to indicate that any of the other provisions of section 11 barred the appeal by the assessee. The view of the Tribunal that the appeal preferred to the Commercial Tax Officer was maintainable is correct.

The petition fails and is dismissed with costs. Counsel's fee Rs. 100.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Sankaralinga Konar .. *Petitioner**

v.

Venkatachala Konar *alias* Govinda Konar .. *Respondent.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), sections 4 and 7—Effect is to make decree an instalment decree—Limitation for execution.

By reason of section 4 of the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955 a decree amount due by an agriculturist is payable only in instalments and by force of that statute the decree becomes an instalment decree and limitation has to be computed accordingly. An instalment decree does not necessarily mean only a decree which *ex facie* makes a provision for its payment in instalments.

Petition under section 25 of Act IX of 1887 praying the High Court to review the order of the Court of the District Munsif of Tirunelveli, dated 2nd December, 1958 and made in Unregistered Execution Petition No. .... of 1958 (G. No. 11159, dated 1st October, 1958) in S.C. No. 1133 of 1951.

S. V. Rama Aiyangar, for Petitioner.

K. V. Rajagopalan, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of the execution of a decree in S.C. No. 1133 of 1951 on the file of the District Munsif, Tirunelveli, and involves for decision a plea of limitation.

The petitioner before me obtained a decree in S.C. No. 1133 of 1951 on the file of the District Munsif's Court, Tirunelveli, on 19th October, 1951. He filed an execution petition which however terminated by a final order, dated 6th July, 1952. The next execution petition filed by him is dated 1st October, 1958. Obviously this execution petition being beyond three years from 6th July, 1952, is barred by limitation but the decree-holder contended in the Court below that the defendant was an agriculturist entitled to the benefits of Madras Act I of 1955 and that the decree amount became payable in instalments as provided for under section 4 of the said Act. He conceded that in respect of the first and second instalments due as per the provisions of the statute the execution petition was barred by limitation but contended that in respect of the third and fourth instalments he was well within time as these instalments became due and payable only on 1st July, 1956 and 1st July, 1957. The learned District Munsif dismissed the execution petition holding that it is barred by limitation. His reasoning is as follows :

"In my opinion Act I of 1955 provides only the mode of payment and does not create any instalment decrees".

The aggrieved decree-holder is the petitioner before me and he contends that the view of the learned District Munsif in regard to this question of limitation is erroneous in law. The learned counsel appearing for the judgment-debtor before me is unable to support the judgment of the Court below.

Section 4 of Madras Act I of 1955 provides :

"Notwithstanding any law, custom, contract or decree of Court to the contrary, an agriculturist shall be entitled to pay within four months of the commencement of this Act the interest due on

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* C.R.P. No. 542 of 1959. 28th January, 1960.
(8th Magha, 1881—Saka).

any debt due by him up to the commencement of this Act and one-eighth of the principal outstanding or one-fourth of the total amount outstanding whichever is less and the balance of the debt in three equal annual instalments on or before the 1st July of each of the succeeding three years with the interest due on such instalment up to that date ".

By reason of the operation of this statute the decree amount is payable only in instalments as provided therein and the decree has become an instalment decree by the force of the statute. An instalment decree does not necessarily mean a decree which *ex facie* makes the amount due under the decree payable in instalments. If the decree-holder can recover money only in instalments as provided by the statute and has to wait for the instalments to become due, it would be unreasonable to hold that all the time he was made to wait for the payment of the instalment, the statute of limitation was running against him. Reference may also be made to the provisions of sub-section (7) of section 4 of Madras Act I of 1955 which clearly indicates that the decree is in the nature of an instalment decree. I hold that the third and fourth instalments due to the decree-holder are not barred by limitation. In the result this Civil Revision Petition is allowed. The judgment of the learned District Munsif is set aside and the unnumbered execution petition on the file of the District Munsif's Court, Tirunelveli will be restored to his file to be disposed of according to law. There will however be no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

C. Mohideen Kutty ... *Petitioner**

v.

A. S. Shaik Mohamed Maricar ... *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7-A—Order under—If ex parte *order which could be set aside under Rule 9 (3) of the Rules under the Act.*

An order made in terms behind the back of a tenant under section 7-A (4) of the Madras Buildings (Lease and Rent Control) Act, 1949, will, also be an *ex parte* order which could be set aside under rule 9 (3) of the Rules framed under the Act. The proceedings before the Rent Controller even under section 7-A (4) of the Act are certainly of a judicial nature and at every stage, subject to the provisions of the Act, the parties have to be heard and orders passed.

Petition under section 12-B of the Madras Buildings (Lease and Rent Control Act of 1941 praying the High Court to revise the order of the Court of Small Causes at Madras, dated 11th December, 1959 and made in H.R.A. No. 165 of 1959 (I.A. No. 225 of 1959 in H.R.C. No. 4832 of 1958), Rent Controller, Madras).

P. Venkataswami and *A. Subramania Ayyar*, for Petitioner.

K. C. Jacob, S. K. L. Ratan and *J. Satyanarayanan*, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of proceedings between the landlord and tenant, initiated by the landlord to evict the tenant, for default in the payment of rent.

An application, H.R.C. No. 4832 of 1958, before the House Rent Controller, Madras, was filed by the landlord, for evicting the tenant, alleging default in the payment of rent from July, 1958 to November, 1958. Under the provisions of section 7-A of the Rent Control Act (Act XXV of 1949) arrears of rent have to be deposited before the tenant can contest the application. It appears that on 16th January, 1959, the Rent Controller passed an order granting time for further payment, the tenant having on that date, issued a cheque in favour of the landlord for Rs. 1,100 on the Nedungadi Bank. On 26th February, 1959, the date to which the proceedings were adjourned, the following order was passed :

* C.R.P. No. 2144 of 1959.

25th January, 1960.
(5th Magha—1881, Saka).

" Respondent called twice, absent. Cheque was dishonoured. Arrears not paid as undertaken. Further proceedings stopped under section 7-A (4) of the Act and eviction is ordered."

The aggrieved tenant filed I.A. No. 225 of 1959 praying that the order passed against him on 26th February, 1959, be set aside on the ground that he could not be present in time on that date when the case was called. This application was resisted but eventually the Rent Controller by his order, dated 1st May, 1959, held in effect that there was sufficient cause for non-appearance and allowed the petition by setting aside the order, dated 26th February, 1959.

The landlord filed an appeal, H.R.A. No. 165 of 1959 , in the Court of Small Causes at Madras challenging the correctness of the decision of the Rent Controller, setting aside the order, dated 26th February, 1959.

On behalf of the landlord, two contentions were urged namely that the application filed before the Rent Controller by the tenant to set aside the *ex parte* order dated 26th February, 1959, was not competent, and, secondly, that the Rent Controller having failed to record a finding that there was sufficient cause for non-appearance by the tenant on that date, his order setting aside the *ex parte* order was erroneous. The Appellate Authority accepted both the contentions and accordingly allowed the appeal and dismissed the application by the tenant for setting aside the *ex parte* order, dated 26th February, 1959. The tenant has now preferred the above Civil Revision Petition.

Learned counsel, Mr. P. Venkataswami, appearing for the tenant contended that the application before the Rent Controller was competent and that the order of the Appellate Authority holding that sufficient cause was not made out by the tenant for his non-appearance on 26th February, 1959, was erroneous and unsustainable.

Mr. S. K. L. Ratan appearing for the respondent, strenuously contended that in view of the specific provisions of section 7-A (4) and the scheme of the Act, an application for setting aside the alleged *ex parte* order, dated 26th February, 1959, was not sustainable in law. His contention is that on the facts of the present case there was no dispute by the tenant regarding the arrears of rent payable and that once the tenant defaulted to deposit or pay the admitted arrears, the Rent Controller had necessarily to exercise his statutory jurisdiction under section 7-A (4) stopping all further proceedings within the meaning of the sub-section. He further contended that the order though, dated 26th February, 1959 must, in effect, be deemed to have been passed on 16th January, 1959, the date on which, admittedly the tenant was present and was also heard. I am unable to agree with this contention. In terms the order, dated 26th February, 1959 is, what may be called, an *ex parte* order, *i.e.*, an order passed behind the back of the tenant. The question whether the tenant had anything to say on that date or could say anything cannot alter the nature of the order passed by the Rent Controller on 26th February, 1959. The proceedings before the Rent Controller even under section 7-A (4) are certainly of a judicial nature and at every stage subject to the provisions of the Act, the parties, have to be heard and orders passed. On 26th February, 1959, if the tenant had appeared, it may be that he could have pleaded for extension of time. It is of course open to the Controller to grant or refuse time. Therefore, I am clearly of the opinion that the order, dated 26th February, 1959, is an *ex parte* order with reference to which the Rules framed under the Act, Rule 9 (3) for setting aside the *ex parte* order will apply. I hold that the application filed by the tenant was competent and sustainable in law.

The next question to be considered is whether the Court of Small Causes, the Appellate Authority was right, in setting aside the order of the Rent Controller who had set aside the *ex parte* order, dated 26th February, 1959. The Court of Small Causes has taken the view that there is no specific finding recorded by the Rent Controller whether or not there was sufficient cause for the non-appearance of the tenant. I do not think that that comment can be justified. The order of the Rent Controller read as a whole discloses that in its opinion the tenant had made out sufficient cause

for non-appearance. The Court of Small Causes has examined the merits of the plea raised by the tenant for not being present in Court on 26th February, 1959. The case of the tenant was that he had attended a marriage on the date of hearing, namely, 26th February, 1959, and some delay was occasioned in reaching the Court. It however appears that even in the course of the same day, 26th February, 1959, the Advocate of the tenant represented to the Rent Controller that some unfortunate delay had occurred. Of course, the Rent Controller could not have done anything on that date unless he was moved to set aside the *ex parte* order. Parties are not to be penalised for not being present in Court at the precise time when the case is called provided, of course, they are not deliberate or wilful in their conduct. The reason adduced on behalf of the tenant was nothing extraordinary and the Rent Controller presumably did accept that reason as being true and sufficient for his non-appearance on that date. There is no warrant on the part of the Appellate Authority to interfere with the exercise of such discretion on the part of the Rent Controller, for little or no reason whatsoever.

In the result the Civil Revision Petition is allowed, the order of the Court of Small Causes, dated 11th December, 1959 made in H.R.A. No. 165 of 1959 is set aside and the order of the Rent Controller, dated 1st May, 1959, is restored. There will, however, be no order as to costs throughout.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

United Bleachers Limited, Mettupalayam .. *Petitioner**

v.

State of Madras by Commercial Tax Officer Coimbatore (North) .. *Respondent.*

Madras General Sales Tax Rules (1939), *Rule* 5 (1) (*g*)—*Assessment including the value of packing materials in a works contract—When permissible.*

The petitioners (United Bleachers Limited) were doing bleaching work for various mills and charged a consolidated rate for bleaching and packing the material and sending it back to the mills. The value of the packing materials was charged to sales-tax and this was questioned.

Held : In order that there could be a levy of sales tax, there should be a sale. Whether in regard to packing materials utilised in the performance of a contract between the parties there was a sale would depend on the agreement between the parties. Such an agreement could be express or implied. Where the main contract was one of sale of goods as packed, such an agreement to sell the packing materials could, having regard to the nature of the contract, be really implied but where the main contract was merely one of service the fact that in the performance of such service packing materials are used and charged for does not lead to a necessary inference that a sale of the materials was intended. In such a case the onus would be on the taxing authority to prove that there was an agreement to sell the packing materials and a sale by the passing of property therein. In the instant case there was no sale express or implied of the packing materials and the value thereof was not assessable to sales tax.

Petition under section 12-B (1) of the Sales tax Act, 1939, read with Rule 13-C (1) (*a*) of the Rules under the Act praying the High Court to revise the order of the Court of the Sales Tax Appellate Tribunal, Madras, dated 25th January, 1957 and made in Tribunal Appeals Nos. 843 and 844 of 1956 preferred against the orders of the Commercial Tax Officer, Coimbatore North, dated 26th March, 1956 relating to the assessment years 1953-1954 and 1954-1955 and made in his Appeals Nos. 419 of 1955-56 and 420 of 1955-56 respectively.

V. Tyagarajan and *T. R. Srinivasa Ayyar*, for Petitioner.

G. Ramanujam for The Government Pleader (*K. Veeraswami*), for Respondent.

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* T.R.C. Nos. 79 and 80 of 1957. 7th December, 1959.
(16th Agrahayana, 1881—Saka).

The Order of the Court was made by

Ramachandra Iyer, J.—These cases are filed under section 12-B (1) of the Madras General Sales Tax Act.

The assessee the United Bleachers Ltd., own a processing factory for textiles in Mettupalayam in the Coimbatore District. Several of the spinning and weaving mills at Coimbatore forward to the assessee unbleached yarn and cloth manufactured by their mills. They are then bleached or dyed, calendered pressed and folded. They are thereafter packed and delivered back to the customer-mills. The packing materials used, namely, brown craft paper, hoop iron, hessian cloth, jute twine palm mats, etc., are purchased by the assessee. In making the charges for services the assessee included in the bill the charge for packing and the packing materials ; they were not however separately shown. The following is an example of a bill issued to the customer.

Description.	*Rate.*	*Amount.*		
To bleaching charges for L.M.C. 21 variety cloth 43,240 yards..	21.53 per yard.	3,839	8	3
To stitching folding, stamping baling charges for above folded into 20 yards and fents ..	2¼ ps per yard.	401	4	0
		4,240	12	3
		or		
		4,240	12	0

(*Rupees four thousand two hundred and forty and annas twelve only*).
Bale Nos. 6541 to 6550, 6571, 6580 to 6591-23 Nos.

For the years, 1953-54 and 1954-55, the assessee was assessed to sales tax on a turnover representing the price of the packing materials utilised by them in their business. The turnover for the former year was ascertained to be Rs. 20,117-4-2, while for the latter year it was Rs. 65,373-1-5. Both the Deputy Commercial Tax Officer, Mettupalayam, and, on appeal, the Commercial Tax Officer, Coimbatore, (North) held that the turnover was liable to assessment. On further appeal by the assessee, the Sales Tax Appellate Tribunal held that, although the assessee did not deal specifically in packing materials, a portion of the profits, earned in the business of bleaching and calendering could be legitimately attributed to the packing materials, as the transaction involved a sale thereof for consideration, and that such a sale would attract a liability to sales tax. The appeals failed.

For the assessee it is contended that no sale is involved in the transfer of the packing materials to their customers, albeit it be one for consideration, as such transfer was incidental to and part of the service of packing which they had to do under the contract. It is not, however their case that, even if the transfer of packing materials involved in the transaction amounted to a sale, they would be entitled to claim a deduction of the charge for packing under rule 5 (1) (*g*) (ii) of the Madras General Sales Tax Act (Turnover and Assessment) Rules, 1939.

Section 3 of the Madras General Sales Tax Act levies a tax on every dealer on his total turnover for each year. A dealer is a person who carries on the business of buying and selling goods. It has been held that the term, ' business ', should be understood in the commercial sense, namely, that there should be profit motive in the venture. Section 2 (*b*) defines a sale as a transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration. It is the case of the assessee that no profit was made in the charges debited for the packing materials, and that there was no motive even to make a profit therein. In our opinion, the contention is based on a fallacy. The profit motive necessary to render a business one contemplated by the Act could be one embracing the whole business, and not in respect of each one of the component parts of the business. It is not necessary either that the dealer should deal specifically in that article. It is not disputed that the object with which the bleaching, etc., was undertaken by the assessee was to earn a profit. That would

be sufficient to attract the liability on the packing materials if they were sold, although no profits were made on them as such.

The question whether there has been a sale of the material, would depend on the contract between the parties, expressed or implied. A mere contract of service, although a transfer of a moveable property is involved therein, cannot by itself imply a sale. For example in the case of a bleaching and dyeing contract, the use of the materials utilised for the purpose of bleaching or dyeing though charged for even at a profit, would not amount to a sale, for the transfer of materials would be necessary or incidental to the contract of service. But, if a person were to buy rice or salt in gunny bags, one could imply a contract to purchase the goods as packed that is, along with the packing materials. In such a case, even if the seller does not intend to make a profit on the gunnies as such, there would be a sale within the meaning of the Act, as there is a profit motive in the business of selling rice or salt. The question whether there has been a sale of packing materials would therefore depend not so much on the fact whether there was a profit motive in making the transfer of those materials, but whether there was an express or implied contract to sell them, it being sufficient that there was a profit motive for the entire business. In *Varasuki & Co.* v. *Province of Madras*[1], salt was sold in gunny bags. Salt, however, was exempt from sales tax. A question arose whether the exemption would extend to the gunny bags as well. The learned Judges held that the assessee in that case should be held to have carried on the business of buying and selling gunny bags as well, in addition to the business of buying and selling salt, and that the exemption from sales tax in respect of salt would not extend to the gunny bags sold. In *Indian Leaf Tobacco Development Co. Ltd.* v. *State of Madras*[2], the question of liability to sales tax for a turnover in respect of packing materials utilised for sale of tobacco came up for consideration. Section 4 of the Act exempted tobacco from the operation of the taxing provisions. It was held that the packing materials would not come within the scope of the exemption granted to tobacco, and the turnover in respect of them would be assessable to tax, unless the assessee had made out a case for exemption under rule 5 (1) (*g*) (ii) of the Madras General Sales Tax (Turnover and Assessment) Rules. A similar view was taken in *Mohanlal Jogani Rice and Atta Mills* v. *The State of Assam*[3], in regard to turnover in respect of gunny bags utilised in the sale of rice.

The decisions referred to above were cases in which there had been a sale of the principal article, and the question arose whether the packing materials used for the delivery of the principal article could also be held to have been sold. In such cases the express agreement between the parties was to purchase the principal article. *e.g.*, salt, tobacco or rice ; there was no specific and separate agreement to purchase the packing materials alone. But, it could not be that the purchaser was agreeable to take the principal article alone ; it is but reasonable to hold that the intention was to purchase the goods as packed, so that in the contract of sale of the principal item the sale of the packing material was implicit. To put it in other words the intention of the parties being to deliver the goods as packed, a contract to purchase the packing materials could readily be inferred in the circumstances of those cases.

In the present case, the contract was one for service, *viz.*, bleaching, dyeing, etc. But as a part of the service, the goods bleached or the dyed articles had to be packed and delivered. But it cannot, however, follow that there can be no sale of packing material, whenever such material was used in connection with the performance of a contract of service. It may be that there is a distinct contract of sale in regard to the packing materials. The question whether there was in a particular case two distinct contracts, one for service and another for sale of the packing materials, would depend on the evidence. Where, however, there are no such distinct contracts that is, where the contract is one and indivisible, and the essential

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1. (1950) 2 M.L.J. 449 : (1951) 2 S.T.C. 1.
2. (1954) 2 M.L.J. 588 : (1954) 5 S.T.C. 354.
3. (1953) 4 S.T.C. 129.

portion of that contract is one for service or labour, the question whether the use of the packing materials also charged for in rendering the service would amount to a sale or not, would depend on the intention of the parties. Packing itself might be a part of the service stipulated, and the fact, that certain materials had to be utilised in rendering that service, might not always mean that there was a sale of the packing materials. It may be that packing was incidental to a service.

In *Krishna & Co., Ltd.* v. *State of Andhra*[1], the assessees had a plant for drying raw tobacco. Certain customers delivered raw tobacco to them for redrying in the machinery. After the process or redrying, the assessees packed the tobacco with the necessary packing materials, purchased by them, and delivered the same to the respective customers. The assessees collected from each customer a consolidated charge for redrying as well as packing. A question arose whether the processes would be liable to sales tax on the turnover of the packing materials. The learned Judges of the Andhra High Court held that, as the packing materials were goods which could not be said to become an intergral part of the drying process, like the parchment and ink of an artist, in respect of which there was a transfer of property, and that, notwithstanding the fact that the drying was only a contract of service, there was a sale in regard to them, the turnover in respect of which would attract the levy of a sales tax. The decision was followed by the same Court in a later case in *Hanumantha Rao* v. *State of Andhra*[2]. The basis of the liability to tax in such a case is contained in the judgment of the learned Chief Justice at page 34 in *Krishna & Co., Ltd.* v. *State of Andhra*[1] :

> "Every person who carries on the business of transferring property in any kind of movable property including materials, commodities and articles in the fitting out, improvement or repair of movable property to another for valuable consideration would be liable to tax on the turnover. It cannot be said that packing material is not "goods" as defined under the Act. They are clearly movable property within the wide meaning of the word "goods" in the Act. The assessee had property in these goods, for, it is conceded that he purchased the material. It cannot also be disputed that he transferred the property in the goods to his customer for consideration. The accounts clearly show that he charged for the material in addition to his remuneration for drying the tobacco, though the price shown in the accounts is the inclusive one. All the ingredients of the charging section, read with definition, are satisfied. Unless we can hold that the materials, after being packed, have been transferred into some other commodity not covered by the definition of goods, it is not possible to hold that there was no sale of that material."

With great respect to the learned Chief Justice, we cannot subscribe to the proposition, that a mere transfer of property for consideration by a person carrying on business would necessarily involve an element of sale, so as to attract the liability to tax. In *Gannon Dunkerley & Co.* v. *State of Madras*[3], a decision to which one of us was a party a question arose whether in a contract for supply of labour and work there was an element of sale of the materials used in the building. It was held that, unless there was an intention in the contract specifically to pass the property in the materials as and when they were brought to the site, the property in the materials passed only when they were fixed in the building, and the contract for building being one and entire, there would be no element of sale of the materials as such.

What distinguishes then a mere contract of labour in which certain materials are used from a contract in which such materials could be held to be sold, is the existence of an intention in the latter to sell the materials as such. Such an intention might be expressed or implied ; but in the absence of such an intention, there could be no sale.

Although the decision of this Court in *Gannon Dunkerley & Co.* v. *State of Madras*[3], was referred to in *Krishna & Co., Ltd.* v. *State of Andhra*[1], the learned Judges did not consider it necessary to base their conclusion on the principle of that decision. Since the decision of the Andhra High Court in the two cases mentioned above, the Supreme Court has rendered its judgment in the appeal from the decision of this Court. The judgment of the Supreme Court is reported in *State of Madras* v. *Gannon*

1. (1956) An.W.R. 866: (1956) 7 S.T.C. 26.
2. (1956) An.W.R. 11: (1956) 7 S.T.C. 486.
3. (1955) 1 M.L.J. 87 : (1955) 5 S.T.C. 216.

Dunkerley & Co[1]. The Supreme Court, analysing the essential elements in the legal concept of a sale of goods held that in order that a transaction might amount to a sale it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which implied a capacity to contract, the money consideration therefor, and the property in the goods passing as a result of the transaction from the seller to the buyer, and that, unless all these elements were present, there could be no sale. Venkatarama Aiyar, J., observed at page 377 :

> " It is the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression " sale of goods " there must be an agreement between the parties for the sale of the very goods in which eventually property passes ".

Therefore, a mere passing of title to the goods, but not as a result of any contract between the parties to sell either express or implied, cannot amount to sale. The principle laid down by the Supreme Court in *State of Madras* v. *Gannon Dunkerley & Co., Ltd.*[1], was applied by us recently to the case of repairs to motor cars effected by a company carrying on business in reconditioning and repairing motor vehicles, where incidentally parts had to be supplied in affecting the repairs. Vide *Sundaram Motors Private Ltd* v. *State of Madras*[2]. The following observations were made at page 695 :—

> " It has been pointed out that a mere passing of the property in the particular chattel is not decisive of the question whether the component parts of that chattel were sold or not. That is to say, if a particular motor part, *e.g.*, king pin bushes is put in the car while reconditioning and repairing it, it is undoubted that title to that motor accessory passes when the repairer delivers the car to its owner ; but to constitute sale of that part it is necessary that there shoud have been an agreement between the parties for the sale of that property. In the *Gannon Dunkerley Case*[3], this Court held that in case of a chattel which has to be produced by the supply of labour and work of the contractor and also by the supply of materials necessary for producing the thing, when the property in the larger corpus passes to the other party, the contract is one for the supply of the larger chattel, and that there is no contract for sale or purchase of the component materials *separatim*. In the instant case there is no question of the transfer of property in the larger corpus, *viz.*, car, as the car belonged to the customer. The contract was to execute works on the car of the customer, and in the course of such repairs certain new accessaries or parts had to be put in. There is no doubt that the property in those materials would eventually pass to the customer, but the question would be whether the agreement between the parties was that such parts should be treated as sold *separatim* or were they merely supplied in the course of carrying out a works conract of repair and charged as such.
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> Therefore whether in the particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of an intention to sell the materials as such ".

The learned Judges of the Andhra High Court, in their decisions in *Krishna & Co.* v. *State of Andhra*[4], and *Hanumantha Rao* v. *State of Andhra*[5], did not consider in the case before them, whether the principal contract being one for service and not for sale of any goods, there had been any agreement between the parties, express or implied, for the sale of packing materials as such. The observations of the learned Judges would appear to imply that in their opinion what was necessary or sufficient to constitute a sale would be a transfer of movable property for consideration by a person carrying on business. That view is not in consonance with the principle that a mere passing of title to goods would not amount to a sale, except when such passing of title was the result of contract, express or implied, between the parties.

Thus, in order that there could be a levy of sales-tax, there should be a sale. Whether in regard to packing materials utilised in the performance of a contract between the parties there was a sale, would depend on the agreement between the parties. Such an agreement could be express or implied. Where the main contract was one of sale of goods as packed, such an agreement to sell the packing materials

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1. (1958) 2 M.L.J. (S.C.) 66 : (1958) S.C.J. 696 : (1958) 9 S.T.C. 353 : (1958) 2 An.W.R. (S.C.) 66.
2. (1959) 2 M.L.J. 351 : (1958) 9 S.T.C. 687 : A.I.R. 1959 Mad. 33.
3. (1955) 1 M.L.J. 87 : (1955) 5 S.T.C. 216.
4. (1956) An. W.R. 866 : (1956) 7 S.T.C. 26.
5. (1956) An. W.R. 11 : (1956) 7 S.T.C. 486.

could, having regard to the nature of the contract, be readily implied : but where the main contract was merely one of service the fact that in the performance of such service packing materials are used and charged for, does not lead to a necessary inference that a sale of the materials was intended. In such a case the onus would be on the taxing authority to prove that there was an agreement to sell the packing materials and a sale by the passing of property therein.

It is not suggested in the present case that there had been any express contract for the sale of packing materials as such between the assessee and their customers. The question then is whether a contract can be implied in the circumstances of the case. As we said before, the principal contract between the parties was one for service. The packing materials were necessary as an incident to that service. Therefore, although the property in the packing materials might have passed to the customers and the price therefor had also been included in the charges for service, there being no agreement to purchase the packing materials as such which could be implied in the case, there would be no sale of the packing materials.

The Revision Cases are allowed with costs in T.R.C. No. 79 of 1957. Advocate's fee Rs. 100.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT : MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

The Additional District Panchayat Officer, Tirunelvel .. *Appellant**

v.

S. Venkatarama Iyer and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), *sections* 4 (3), 10 (2), 20, 21 *and* 25 (3)—*Rules relating to Election of President of Panchayat—Rule* 2 (2) (1) (*a*) *and* (3) (*a*)—*Scope and effect—Temporary President—Powers of.*

Words and Phrases—Vacancy.

A Panchayat constituted under the Madras Village Panchayats Act, 1950, is a body corporate having perpetual succession under section 4 (3) of the Act and hence the body corporate will continue notwithstanding casual vacancies. When the term of office of one set of members expires by efflux of time, the Panchayat as such is not dissolved but only new members come in as a result of new elections. Section 10 (2) which provides for anticipatory elections is intended to avoid administrative inconvenience. Even section 20 which provides that there shall be a President and Vice President for every Panchayat implies that a Panchayat first exists. Hence there is no warrant for holding that without a President or Vice-President there can be no Panchayat having legal existence.

Read in this context of the provisions of the Act, rule 2 (2) and (3) of the Rules Relating to Election of President of the Panchayat would apply to all vacancies in the office of the President whether they are casual or whether they are ordinary arising by efflux of time.

A Temporary President appointed under the Act could preside over the meeting under section 25 (3) of the Act, which is a comprehensive provision to deal with every class of contingency in which neither the President nor the Vice-President is available, whether due to incapacity or due to vacancy.

Suryanarayanamurthy v. *State of Andhra Pradesh,* (1957) 2 An. W.R. 176, distinguished.

Vacancy means the state of being not filled or occupied which may arise by death, efflux of time, resignation or removal and an office newly created is *ipso facto* vacant at creation.

Appeal uder clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Balakrishna Ayyar dated 11th August, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 192 of 1959 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the conduct of the meeting and election of President held on 5th January, 1959 at the Panchayat Office, Kadayanallur, particularly the minutes book of the Panchayat Board, Kadayanallur and quash the proceedings electing the new President.

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* W.A. No. 77 of 1959. 18th December, 1959.
(27th Agrahayana, 1881—Saka).

The Advocate-Genral (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*M. M. Ismail*), for Appellant.

S. Mohankumaramangalam, *K. Hariharan*, *V. Ramaswami*, *K. Veeraswami*, *G. Ramanujam*, and *T. R. Mani*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Ayyar, J., in Writ Petition No. 192 of 1959 which was filed in the following circumstances. The term of office of the members of the Kadayanallur Panchayat expired on 18th December, 1958. Anticipatory election of the members to fill up the vacancies which would arise on the expiry of the term of the previous members was completed on 28th November, 1958. The Additional District Panchayat Officer in pursuance of the powers delegated to him by the Inspector of Municipal Councils and Local Boards purported to appoint one Abdul Hameed, one of the newly elected members, as 'Temporary' President under section 25 (3) of the Madras Village Panchayats Act, 1950, and he took charge as such on 18th December, 1958. The Regional Inspector of Municipal Councils and Local Boards, Tirunelveli, who is the Election Authority under the relevant rules, appointed the Additional District Panchayat Officer, Tirunelveli, as the Election Officer, to convene a special meeting of the Panchayat to conduct the election of the President of the Panchayat. The meeting was fixed on 5th January, 1959. On that day all the fifteen elected members attended the meeting. It was presided over by the Election Officer aforesaid. There was contest between two candidates of whom Muhammad Rowther was declared duly elected as President inasmuch as he had obtained more votes than the other candidate. A notification, was duly published that Muhammad Rowther had been elected President of the Panchayat. Thereupon, one of the members, of the Panchayat filed a writ petition out of which this appeal arises, to call for the records connected with the conduct of the meeting and election of the President held on 5th January, 1959, at the Panchayat Office, Kadayananallur, and to quash the proceedings electing the new President. The main grounds on which the petitioner alleged the elction was illegal and void were the following:

(1) There were no specific rules framed under the Act for the conduct of the election of the President of the Panchayat when the old Panchayat had been dissolved and new members had been elected.

(2) When there was a Temporary President appointed under the provisions of the Act, there was no justification for overlooking and ignoring him.

The Additional District Panchayat Officer, Tirunelveli, filed a counter-affidavit in which he supported the validity of the election. . According to him, the election was conducted strictly in accordance with the rules and he was the proper person to convene the meting and preside at it. He further denied that the Temporary President appointed under section 25 (3) of the Act had any right to convene or preside at such a meeting. Balakrishna Ayyar, J., heard and disposed of the petition. He held that there were no rules for the election of a President of the Panchayat in circumstances such as are present in the case before us, that is, when all the members of a Panchayat are newly elected on the expiry of the term of office of the previous set of members. He, therefore, quashed the election held on 5th January, 1959. The Additional District Panchayat Officer, Tirunelveli, has filed this appeal challenging the correctness of the ruling of Balakrishna Ayyar, J.

The decision of the question depends upon the interpretation of certain provisions of the Madras Village Panchayats Act and Rules framed thereunder, and so far as this Court is concerned, it is *res integra*. There can be no doubt as to the importance of the question, because, if the interpretation placed by Balakrishna Ayyar, J., were to prevail, there will be a stalemate in respect of several Panchayats, members of which are newly elected. Though all the members have been elected, it would not be possible to have the President elected validly. Of course, if we are driven to this conclusion, we cannot certainly avoid it, because, it may lead to inconvenience.

Before dealing with the reasoning on which the learned Judge, Balakrishna Aiyar, J., came to his conclusion, it will be necessary to refer to material provisions of the Act and the Rules. Section 4 (3) provides that every Panchayat will be a body corporate by the name of the village specified in the notification issued under section 3, and shall have perpetual succession and a common seal. This is an important provision, the significance of which was apparently overlooked by the learned Judge. The members of the Panchayat shall be elected in such manner as may be prescribed (section 7) and admittedly there are rules in force which relate to election of the members of the Panchayat. Section 10 which lays down the term of office of the elected members as five years from the date on which the vacancy occurs, divides vacancies into two broad heads, ordinary vacancies and causal vacancies. Ordinary vacancies shall be filled at ordinary elections which shall be fixed by the election authority to take place on such day or days within three months before the occurrence of the vacancies (section 10 (2)). Under sub-section (3) (*a*) and (*b*) a member elected in a casual vacancy shall hold office only so far as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred. The following are the material sections concerning the office of President and Vice-President of Panchayat.

" *Section* 20.—There shall be a President and Vice-President for every Panchayat.

Section 21.—The President and Vice-President shall be elected by the Panchayat from among its members in accordance with such procedure as may be prescribed.

Section 23.—The President or Vice-President shall cease to hold office as such—

(*a*) in every case, on his election as President or Vice-President of the District Board, or of any other Panchayat in the district ;

(*b*) in the case of the President, on his becoming disqualified for holding the office or on his removal from office or on the expiry of his term of office ;

(*c*) in the case of the Vice-President, on the expiry of his term of office as a member or on his otherwise ceasing to be a member or on his election as President ".

The functions of the President are contained in section 24 and include making arrangements for election of the Vice-President and convening the meetings of the Panchayat. Section 25 is of particular importance. It runs thus :

Section 25 (1) :—When the office of President is vacant, the Vice-President shall exercise the functions of the President until a new President is declared elected and assumes office.

(2) If the President has been continuously absent from jurisdiction for more than fifteen days or is incapacitated, his functions during such absence or incapacity shall, except in such circumstances as may be prescribed, devolve on the Vice-President.

(3) When the office of President is vacant or the President be continuously absent from jurisdiction for more than fifteen days, or is incapacitated and there is either a vacancy in the office of Vice-President or the Vice-President has been continuously absent from jurisdiction for more than fifteen days or is incapacitated, the functions of the President shall devolve on a member of the Panchayat appointed by the Inspector in this behalf.

The member of the Panchayat so appointed (who shall be styled Temporary President) shall perform the functions of the President subject to such restrictions and conditions as may be prescribed until a new President or Vice-President is declared elected and assumes office, or either the President or the Vice-President returns to jurisdiction or recovers from his incapacity, as the case may be.

(4) Any vacancy in the office of President shall be reported to the election authority, by such person and within such time as may be prescribed, and the election authority shall arrange for the election of the President.

(Sub-sections (5), (6) and (7) are not material).

The Rules Relating to the Conduct of Election of Presidents and Vice-Presidents of Panchayats were duly made by the Government and published in the Gazette. They provide (1) for the convening of a meeting for the election and (2) for presiding at such a meeting, besides prescribing the procedure for the conduct of the election. The relevant provisions are as follows :—

2. (1) The election of the President or Vice-President of a Panchayat shall be held in the office of the Panchayat where there is one, and in case there is no such office in a conspicuous place in the village, by the members at a meeting thereof specially convened for the purpose.

(2) (i) Such meeting shall be convened as soon as possible after the occurrence of the vacancy.

(*a*) in the case of the election of the President of a Panchayat, by its Vice-President, and if there is either a vacancy in the office of the Vice-President or he has been continuously absent from jurisdiction for more than fifteen days or is incapacitated by the person appointed by the election authority in this behalf; and

(*b*) in the case of the election of the Vice-President of a Panchayat, by the Presdient of the Panchayat.

(ii) Notice of the day and hour of the meeting shall be given to the members at least five clear days previous to the day of the meeting.

(3) Such meeting shall be presided over :—

(*a*) if held for the election of the President of a Panchayat, in cases falling under sub-section (3) of section 25 of the Act by the person appointed by the election authority to convene the meeting and, in other cases by its Vice-President or if such Vice-President himself do stand as a candidate at the election, or in his absence by a member of the Panchayat, not intending to stand as a candidate at the election, chosen by the meeting to preside for the occasion ; and

(*b*) if held for the election of the Vice-President of a Panchayat, by the President of the Panchayat or in his absence, by a member thereof not intending to stand as a candidate at the election chosen by the meeting to preside for the occasion.

The short question which falls for decision in this case is whether Rule 2 (2) (i) (*a*) and sub-rule (3) (*a*) apply to the circumstances of this case. According to the learned Judge, in effect, these rules will only apply to casual vacancies.

We start with this fundamental notion that a Panchayat constituted for each village is a body corporate having perpetual succession. The Panchayat is constituted for each village under section 4 (1) by the publication of a notification under section 3 (1) which says that the Inspector may by notification declare any part of a revenue taluk to be a Village Panchayat for the purpose of this Act and specify the name of the village. The Panchayat as a body corporate would continue notwithstanding casual vacancies. When the term of office of one set of members expires by efflux of time, the Panchayat as such is not dissolved. New members come in as a result of new elections. To avoid administrative inconvenience section 10 (2) provides for anticipatory elections, elections which take place within three months before the occurrence of the vacancies. There is no warrant for holding that without a President or Vice-President there can be no Panchayat having a legal existence. Section 20 declares that there shall be a President and Vice-President for every Panchayat. It implies that the Panchayat first exists. Section 21 provides that the President and Vice-President shall be elected by the Panchayat from among its members. This section obviously applies not only to casual vacancies but also to ordinary vacancies. When a President or Vice-President in office ceases to hold office by efflux of time, the election is from among members by the members. It may be mentioned that prior to the Amending Act XXIV of 1957 the President of the Panchayat was being elected not by the members of the Panchayat only but by every voter in the Panchayat area. Under section 21 the President shall be elected by the Panchayat from among its members in accordance with such procedure as may be prescribed. It is this procedure which we find prescribed in the rules mentioned above. The rules were framed under G.O. No. 602, L.A., dated 5th April, 1958, soon after the coming into force of Madras Act XXIV of 1957.

We have spent considerable time with the help of arguments by leading counsel including the learned Advocate-General in construing the provisions of Rule 2 (2) and (3) of the Election Rules read along with the provisions of the main Act. On a plain reading of the language and giving the terms and expressions their ordinary meaning we are clearly of opinion that the said sub-rules (2) and (3) of Rule 2 of the Election Rules apply to all vacancies in the office of the President whether they are casual or whether they are ordinary, that is, arising by efflux of time. Rule 2 (2) (i) (*a*) says that in the case of election of the President of a Panchayat the meeting shall be convened by its Vice-President ; but if there is a vacancy in the office of the Vice-President, the meeting should be convened by the person appointed by the election authority in this behalf (in the present case by the Additional District Panchayat Officer). Here obviously there is no person filling the office of the Vice-President and therfore there is a vacancy in that office. So the election meeting was

properly convened by the person appointed by the election authority as the election officer. Now at such a meeting so convened, who is to preside? Under sub-rule (3) (*a*), in cases falling under sub-section (3) of section 25 of the Act, the person appointed by the election authority to convene the meeting. The question narrows itself further into this, namely, is the present case a case falling under sub-section (3) of section 25 of the Act? Now sub-section (3) opens with the words " when the office of President is vacant". That is one condition. The other condition is "and there is........a vacancy in the office of Vice-President".

Undoubtedly in the present case both the offices of President and Vice-President are vacant, in the sense that there is no one to fill the office lawfully. The Temporary President appointed under sub-section (3) is not given the power to convene a meeting for such election.

What is a vacancy? The Oxford Dictionary has this :

> " The fact or condition of an office or post being, becoming, or falling vacant ; an occasion or occurrence of this.
>
> A vacant or unoccupied office, post or dignity ".

'Vacant' means *inter alia* " not filled or occupied, devoid of an occupant ". In Anderson's Dictionary of Law we find the following instructive information :

> " Vacancy is the state of being empty or unfilled........... An old office is vacated by death, resignation or removal. An office newly created is *ipso facto* vacant at creation ".

The position therefore is this. The Panchayat of Kadayanallur had been duly constituted by notification under section 3(1) read with section 4 (1) of the Act. That Panchayat was functioning with members and a President and a Vice-President, till 17th December, 1958. Under section 10 (2) anticipatory elections had been held to elect members of the Panchayat or to fill the ordinary vacancies in the office of elected members. On and from 18th December, 1958, such elected members were in office but no President or Vice-President had been elected. The previous President and Vice-President had vacated their offices on 17th December, 1958, with the result that there were vacancies in the office of the President and Vice-President. It is because of this circumstance that the Inspector appointed a 'Temporary' President. Nothing was said to convince us that the appointment of the Temporary President was invalid or *ultra vires*. If it was not, then obviously the case fell under section 25 (3). Rule 2 (3) (*a*) expressly provides that a meeting for the election of the President of a Panchayat, in cases falling under sub-section (3) of section 25 of the Act shall be presided over by the person appointed by the election authority to convene the meeting. That is what has happened in this case. The election of the President at a meeting convened and presided over in the manner prescribed by the Rules was perfectly valid.

Now let us consider the reasoning of Balakrishna Ayyar, J., on which his conclusion that there are no rules which would apply to the election of a Panchayat in such a contingency as that which arose in the present case is based. In the view of the learned Judge sub-section (3) of section 25 of the Act can apply only where in a Panchayat which is existing and functioning, a situation arises in which both the President and the Vice-President have ceased to be able to function, but it cannot apply to a case where a Panchayat has yet to be constituted and begin to function. He overruled the contention of the Government Pleader that the expression 'vacant' was wide enough to cover cases where no incumbent had been elected on the ground that the context was repugnant to this argument. In one part of his judgment the learned Judge was willing to concede that there are two kinds of vacancies, ordinary vacancies and casual vacancies, and that the term vacancy could apply to both kinds ; but in his opinion section 25 necessarily postulated the prior existence of a Panchayat. With great respect to the learned Judge we are unable to see any reason why the connotation of the term 'vacancy' should be restricted to casual vacancies. Section 25 (3) of the Act was presumably enacted in the interests of the continuous administration of the affairs of the Panchayat. As the President o the Panchayat has certain important functions in this behalf, and the Vice-President in certain contingencies,

it was thought necessary that there should be same one to carry on such functions when neither of them is available for one reason or another. Section 25 (3) of the Act comprehends several possible contingencies, namely, that neither a President nor a Vice-President is available to discharge the functions of the President. There may be a vacancy in the office of the President and also a vacancy in the office of the Vice-President. There may be a vacancy in the office of the President and the Vice-President might have been incapacitated or continuously absent from jurisdiction for more than fifteen days. The President might be incapacitated and the office of the Vice-President might be vacant, or he might have been incapacitated or continuously absent from jurisdiction for more than fifteen days. In all such cases the Inspector is given the power to appoint a member of the Panchayat to perform the functions of the President subject to such restrictions and conditions as may be prescribed until a new President or Vice-President is declared elected and assumes office, or either the President or the Vice-President returns to jurisdiction or recovers from his incapacity as the case may be. It is quite true that as the learned Judge points out, sub-section (1) of section 25 contemplates the case where a casual vacancy in the office of the President has occurred. On the other hand, sub-section (2) does not deal with a case of vacancy at all. It applies when the President is not available to perform his functions either because he is incapacitated or because he has been continuously absent from jurisdiction for more than fifteen days. Sub-section (3), as already explained, is a comprehensive provision to deal with every class of contingency in which neither the President nor the Vice-President is available, and one of the reasons for the President not being available is when the office is vacant. Surely when the Inspector appointed Abdul Hameed as the 'Temporary' President on 18th December, 1958, this contingency had occurred. The office of the President was vacacant and so was the office of the Vice-President.

The learned Judge's view is founded on the basic assumption that sub-section (3) of section 25 can apply only when a situation arises in which neither the President nor the Vice-President is able to function and that sub-section postulates the existence of a Panchayat. We have already pointed out that the existence of a Panchayat does not depend upon the existence of a duly elected President and Vice-President. The Panchayat is a corporate body which has perpetual succession. Its constitution does not depend upon the Election of the President and the Vice-President. We are clearly of opinion that there is no warrant for this assumption. We cannot agree with the following observations of the learned Judge :

> "In other words, sub-section (3) can apply only where in a Panchayat which is existing and functioning a situation arises in which both the President and the Vice-President have ceased to be able to function. It cannot apply to a case like the present where a Panchayat has yet to be constituted and begin to function".

Reference was made to the decision of a Division Bench of the Andhra High Court in *Suyanarayanamurthy* v. *State of Andhra Pradesh*[1]. In that case a person was appointed Temporary President of the Panchayat during the interregnum between the expiry of the period of office of the mebers of the old Panchayat and the coming into effect of the office of the members elected under the provisions of the amended Act. The appointment was purported to be made under sub-section (3) of section 25. A Government Order dated 4th August, 1956 provided that a meeting for the purpose of co-opting a woman member for the said Pachayat should be convened, in cases where no Special Officer has been appointed by the District Panchayat Officer. The contention of the person who had been appointed Temporary President was that it was only he who could convene and conduct that meeting. The learned Judges held that he had no such right for two reasons : (1) that no appointment under section 25 (3) could be validly made by the Inspector of Local Boards because that provision contemplates the existence of a Panchayat actually functioning and (2) that even if he be deemed to be validly appointed Temporary President, he could not convene the meeting as the meeting could not be described as a meeting of the Panchayat. In the result they held that the District Panchayat Officer was competent to conduct the

1. (1957) 2 An. W.R. 176.

election. With geat respect to the learned Judges we are unable to accept their view. We entirely agree with the decision that the person appointed temporary President under sub-section (3) of section 25 of the Act had no right to conduct the meeting but not for the reasons given by them. The learned Judges in that case proceeded on the assumption that the appointment of the temporary President was before the coming into effect of the office of the members elected under the provisions of the amended Act. The woman member had not been co-opted. The following observation is significant :

> " It would seem that there can be no meeting of a ' Panchayat ' until the Panchayat is properly constituted and the amended Act contemplates the co-option of a woman member to complete the election of the members of the Panchayat ".

This is not the position in the case before us. As we have already said, though we entirely agree with the eventual decision in that case, we find that the decision itself has no application to the facts of the case before us. We have already said that we are not in agreement with their construction of sub-section (3) of section 25 of the Act.

We therefore hold that there was nothing illegal in the election of the President at the meeting of the Panchayat held on 5th January, 1959, convened and presided over by the Additional District Panchayat Officer, Tirunelveli. The appeal is allowed and the Writ Petition by the 1st respondent is dismissed.

R. M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Gopala Menon and another .. *Appellants**

v.

Sreenivasa Varadachariar and others .. *Respondents.*

Usurious Loans Act (*X of* 1918) (*as amended by Madras Act, VIII of* 1937), *section* 3—*Scope of.*

To decide whether the interest provided in any loan transaction is excessive the Court is governed entirely by the considerations expressly mentioned in section 3 (2) (*a*) to (*c*) of the Usurious Loans Act, 1918, as amended by Madras Amendment Act, 1937. It is not open to the Court to hold that interest is excessive on considerations which are unrelated to the circumstances mentioned in the said provisions. Nor is it possible to lay down an absolute maximum rate of interest beyond which interest would be excessive within the meaning of the Usurious Loans Act. In deciding whether the interest charged is excessive several factors have to be taken into consideration and it will be in direct contravention of section 3 (2) (*a*) to (*c*) of the Act to ignore such factors and to lay down a general rule that any interest above a specific rate will be excessive. Nor could it be said as a rule that compound interest is *per se* usurious.

Where there is security which is *prima facie* not inadequate quarterly rests for the calculation of compound interest at 15 per cent. per annum makes the interest excessive and the Court must presume that the transaction was substantially unfair and give relief. The presumption, however, could be rebutted.

Appeal from the judgment and decree of the Honourable Mr. Justice Ramaswami, dated 7th December, 1954 and 22nd February, 1955, respectively passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 72 of 1950.

K. V. Venkatasubramania Iyer and *T. C. Raghavan*, for Appellants.

C. Srinivasachari, T. V. Balakrishnan, C. R. Rajagopalachariar, S. Amudachari, V. S. Rangachari, N. Panchapakesa Ayyar and *R. Sundaralingam*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J..—This is an appeal from the judgment and decree passed by Ramaswami, J., in a suit instituted on the Original Side of this Court, C.S. No. 72

*O.S. Appeal No. 104 of 1955. 1st September, 1959. (10th Bhadra, 1881—Saka).

of 1950. The suit was for the recovery of the amount due under four mortgages which were executed by one Dhanakoti Ammal in favour of the plaintiff, Srinivasa Varadachariar, on 20th March, 1936, 14th September, 1936, 27th July, 1937 and 2nd January, 1938 for sums of Rs. 25,000, Rs. 9,000, Rs. 7,000 and Rs. 7,000 respectively. The terms relating to the interest were the same in respect of each of these four mortgages, namely, Rs. 15 per cent. per annum compound with quarterly rests. A favourable rate of interest at 12 per cent. per annum was, however, provided in case of payment of interest due for each month by the 20th day of succeeding month. Dhanakoti Ammal was adjudged insolvent and her estate vested in the Official Assignee, Madras. The Official Assignee sold the four items mentioned in the plaint schedule comprised in the four mortgages to Dr. Gopala Menon on 6th July, 1944. The sale was subject to the aforesaid four mortgages. Though there were several defendants in the suit, the main contesting defendant was Dr. Gopala Menon, the second defendant. The only plea in defence was that the interest provided in respect of the mortgages is excessive and that he would be entitled to relief under the Usurious Loans Act. Ramaswami, J., who tried the suit reduced the interest to 15 per cent. per annum compound interest with yearly rests. The second defendant Dr. Gopala Menon is the appellant before us and in the appeal the arguments were confined to the same plea of excessive interest.

Mr. K. V. Venkatasubramania Ayyar, learned counsel for the appellant, contended that the interest provided under the mortgage deeds was usurious and therefore he was entitled to relief under the Usurious Loans Act and submitted that the interest should be reduced to 12 per cent. simple till date of plaint. The only question in this appeal therefore is what if any is the relief which the appellant can be granted under the provisions of the Usurious Loans Act (X of 1918). The relevant section of the Usurious Loans Act as amended by the Usurious Loans (Madras Amendment) Act (VIII of 1937) is section 3 which runs thus :

"3. (1) Notwithstanding anything in the Usury Laws Repeal Act, 1865, where in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe : that the transaction was, as between the parties thereto, substantially unfair, the Court shall exercise one or more of the following powers, namely.

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest ;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just."

The provisos are not material.

"*Explanation I.*—If the interst is excessive, the Court shall presume that the transaction was substantially unfair ; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest ;

Explanation II.—In the case of a suit brought on a series of transactions the expression ' the transaction ' means, for the purpose of Proviso (1), the first of such transactions.

(2) (*a*) In this section ' excessive ' means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(*b*) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated and the total advantage which may reasonably be taken to have been expected from the trasnaction.

Provided that in the case of loans to agriculturists if compound interest is charged, the Court shall presume that the interest is excessive.

(*c*) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous

transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(*d*) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor."

It was not suggested by learned counsel for the appellant, Mr. Venkatasubramania Ayyar, that the transactions of mortgages in respect of which the suit has been brought were substantially unfair because of circumstances materially affecting the relations of the parties at the time of the loan. Nor did he contend that there were other circumstances arising from the position in which the debtor was placed at the time of the transactions which rendered the transactions unfair. His contention was confined to this, namely, that the transaction was substantially unfair because the interest was excessive. Now to decide whether the interest which has been provided in respect of these suit mortgages is excessive, we are governed entirely by the considerations expressly mentioned in section 3 (2) (*a*), (*b*) and (*c*). In our opinion it is not open to the Court to hold that interest is excessive either because the rate is high in the view of the Court, completely divorced from the circumstances of the case such as are refered to in sub-section (2) (*a*), (*b*) and (*c*) or to hold that the interest is excessive because of any other condition regarding interest, unless such condition has related to the circumstances mentioned in the said provisions. Mr. Venkatasubramania Ayyar contended that 'excessive' in so far as the rate is concerned implies an objective arithmetical standard rate irrespective of the facts relating to each transaction of loan, and he made it a part of his argument that anything in excess of 12 per cent. simple interest must be deemed to be excessive. In support of his contention he placed much reliance on a decision of a Division Bench of this Court in *Venkatrao* v. *Venkataratnam*[1]. There are undoubtedly observations in this decision which lend *prima facie* support to the contention of Mr. Venkatasubramania Ayyar. Govinda Menon, J., who delivered the judgment of the Division Bench, said :

"We are also of opinion that in the Madras State it has been long understood that 12 per cent. simple interest is a fair, proper and reasonable rate.............We have already expressed the opinion that anything above 12 per cent. per annum simple interest is excessive, considering the nature of transactions in this State."

We do not, however, understand the effect of this decision to be to lay down an inflexible rule that anything above 12 per cent. per annum simple interest is excessive, whatever be the particular circumstances relating to a particular transaction of loan. So far as we are aware, this decision has not been understood to have that effect. In *Balasaraswathi Ltd* v. *Parameswara*[2], another Division Bench of this Court to which one of us was a party, though this decision of Govinda Menon and Ramaswami Goundar, JJ., was referred to, it was held that there could be no absolute maximum rate of interest beyond which it would become automatically usurious and unconscionable, and that the circumstances of each case must be examined to judge whether the rate is penal, usurious or unconscionable. Subba Rao, J., in C.S. No. 163 of 1949, which related to a mortgage executed by Dhanakoti Ammal herself prior to the suit mortgages, made it clear that the observation in *Venkatrao* v. *Venkataratnam*,[1], that in the Madras State anything above 12 per cent, simple interest is excessive, cannot be taken as a principle of law applicable to all cases irrespective of the circumstances obtaining at the time of the transactions. On the evidence before him Subba Rao, J., reduced the rate of interest from 15 per cent. compound interest to 12 per cent. per annum simple. We are clearly of opinion that to lay down an absolute maximum rate of interest beyond which interest would be excessive within the meaning of the Usurious Loans Act would be in direct contravention of what is laid down in the Act itself. Section 3 (2) (*a*) (*b*) and (*c*) of the Usurious Loans Act which continue to be applicable notwithstanding the Madras amendment makes it abundantly clear that in deciding whether

1 (1952) 2 M.L.J. 27 : A.I.R. 1952 Mad. 872. 2. A.I.R. 1957 Mad. 122.

the interest charged is excessive, several factors have to be taken into consideration. One important fact will be the risk incurred as it appeared or must be taken to have appeared, to the creditor at the date of the loan. In considering the question of risk, section 3 (2) (*c*) enacts that it will be material to take into account the presence or absence of security and the value thereof, and the financial condition of the debtor and the result of any previous loan transactions known to the creditor. If compound interest is charged, the periods at which it is calculated and the total advantage which may be reasonably expected to have accrued from the transaction are important factors. Having regard to these factors it is now necessary to deal with the facts of the case before us. The following facts are either admitted or beyond dispute, or, in any event, they appear to be clearly established on the evidence. Before the execution of these four mortgages by Dhanakoti Ammal to the plaintiff, there was a prior mortgage of 1933 for Rs. 4,000 and the interest provided was 15 per cent. compound with quarterly rests. Even by the date of the first of the four suit mortgages a sum of Rs. 8,000 was due in respect of this prior mortgage and the amount must have been larger by the date of the succeeding three suit mortgages. There was of course security for the loan. Item 1 is a vacant site of about 8 cawnies. Items 2 and 3 are houses and item 4 is a market situated on about 27 grounds. Item 5 is a vacant site of nearly 3 acres. But the properties were situated in Kodambakkam on the outskirts of the city, and at the time of the loan the area was undeveloped though there was a prospect of development. The son of the plaintiff who gave evidence as P.W. 1 deposed that at the time when the first loan was advanced in 1936 the value of a ground was about Rs. 200 and that it was an undeveloped area and the market was in a dilapidated condition fetching about Rs. 100 per mensem. It may be that today the properties are worth nearly three lakhs but that is a circumstance which is irrelevant. The amount advanced under the four mortgages comes to nearly Rs. 48,000. There was already a prior mortgage in respect of which nearly Rs. 8,000 was due by the date of the first of the mortgages. It appears to us to be reasonably clear that though there was certainly security, the value of the security was certainly not very ample, though at the same time it cannot be said that it was markedly inadequate. It might well have appeared to the creditor that if a long time were to elapse before the money due under the mortgages can be recovered, the value of the security might not be sufficient to cover the entire amount which would become payable.

There is also another fact which also must have contributed to the idea that the creditor was undergoing a risk in granting the loan. Admittedly there was litigation in respect of the properties. A brother of the mortgagor had filed a suit claiming that the entire property was ancestral property and the will under which Dhanakoti Ammal derived title to the property was invalid. That suit no doubt was decided against him in the trial Court as well as in the appeal. But there was at or about the time of the first loan a certain apprehension that a suit would be filed by the brother after he attained majority to set aside the decree in the prior suit on the ground that his next friend was negligent in the conduct of the suit. Eventually such a suit was filed on the Original Side of this Court, C.S. No. 7 of 1937. The plaint appears to have been prepared even in December, 1936. The third and the fourth of the suit mortgages were certainly executed after the institution of the suit. It may be that the suit was without much substance, but it is idle to completely disregard it. The suit, and before it, the apprehension that the suit would be instituted, must have cast a shadow on the title of the mortgagor.

At the same time there is another feature of the mortgages to which section 3 (2) (*b*) would apply, that is, in so far as it declares that if compound interest is charged, the periods at which it is calculated should be taken into account in considering whether the interest is excessive. We have no hesitation in holding that compound interest calculated with quarterly rests is certainly excessive.

On a consideration of the entire evidence bearing on the point revealing the circumstances in which the loan transactions came into existence we hold that 15 per cent. compound interest calculated at quarterly rests is certainly excessive. When arriving at this conclusion we have taken into account the following factors :

(1) the presence of security,

(2) the value of the security which cannot be said to be *prima facie* inadequate and

(3) the quarterly rests for the calculation of compound interest.

Once we hold that the interest is execessive it follows from *Explanation* I to section 3 (1) inserted by the Madras Act VIII of 1937 that the Court must presume that the transaction was substantially unfair. Though this presumption can be rebutted by proof of special circumstances justifying the rate of interest, our attention was not drawn to any such special circumstances.

The next question which arises, is what is the relief to which the appellant Dr. Gopala Menon is entitled? We have already observed that it cannot be laid down that any interest in excess of 12 per cent. per annum simple is excessive, and that therefore the Court cannot grant a decree for more than at that rate. So far as we are aware, it has never been held that compound interest *per se* is usurious. The very fact that section 3 (2) (*b*) mentions only the periods at which compound interest is charged clearly indicates that there could be compound interest calculated at reasonable intervals which would not be 'excessive', within the meaning of the enactment. The plaintiff is a money-lender and presumably he would be able to invest the interest if paid on the due dates and earn profits therefrom. For the deprivation of his profits it would not be inequitable to hold that on default of payment of interest for a period of one year the amount due for interest should be treated as further principal.

Ultimately the rate and terms of interest to be fixed by the Court when granting relief must of necessity be arbitrary. Taking all the circumstances into consideration we hold that 10 per cent. compound interest with yearly rests would not be excessive. The appeal is allowed to this extent and there will be a decree calculating interest at the rate which we have now fixed. From the date of the plaint the interest would be six per cent.

We may mention that though we have been taken through the evidence bearing on the subject we have purposely refrained from making any reference to an alleged agreement between Dr. Gopala Menon and the plaintiff relating to the discharge of the four mortgages because that agreement was not acted upon, nor was it pressed on us by either side. Such an agreement cannot assist us in any manner to decide whether the rate of interest provided in the mortgages was excessive at the time when the mortgages were executed.

Though the point appears to have been raised before Ramaswami, J., that the provisions of the Usurious Loans Act cannot be availed of by a transferee of the equity of redemption, before us, this point was not pressed and rightly by the learned counsel for the plaintiff-respondent.

In the appeal there will be no order as to costs. Time for redemption six months.

R.M. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Trustees of the Port of Madras .. *Appellants**

v.

The State of Madras by Collector of Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 2 (b) and section 18—Dealer—Port of Madras supplying water to ships calling at the Port at stipulated rates—If a dealer within the meaning of the Act and if liable to the sales-tax on the sale of water—Bar of suit under section 18—When applicable.

In supplying water to the ships that call at the Port of Madras the trustees are only discharging a statutory duty imposed on them and are not carrying on any business with a view to make profit so as to make them a dealer within the meaning of section 2 (b) of the Madras General Sales Tax Act, 1939. The bar of suit under section 18 of the Act will not apply to cases of recovery of amount illegally collected as sales tax by the Authorities.

Appeal against the decree of the Court of the Additional Judge of the City Civil Court, Madras, in Appeal Suit No. 62 of 1955, preferred against the decree of the Court of the First Additional Judge of City Civil Court, Madras, in Original Suit No. 953 of 1950.

V. V. Raghavan and *V. P. Raman*, for Appellants.

The Government Pleader (*K. Veeraswami*), and *G. Ramanujam*, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal raises a question regarding the liability of the Trustees of the Port of Madras to sales tax in respect of the charges levied and collected by them for water supplied to the ships that anchor at the Madras Port. Under section 171 of the City Municipal Act, the Corporation of Madras, is bound to supply the Port Trust with water on such terms as to payment and subject to such conditions of supply as shall be determined by the Council of the Corporation, subject to appeal to the State Government. The water supplied by the Corporation is stored by the Port Trust authorities in tanks specially constructed for the purpose and thereafter utilised for the purposes of the Port. One of the purposes, for which water is utilised, is to supply the same to the ships that call at the Port of Madras. The Corporation charges the Port Trust at the rate of Rs. 4-7-0 per 1,000 gallons of water supplied by it. The Port Trust, in turn, charges the ships which take water on the quayside at the rate of Rs. 5-8-0 per 1,000 gallons. But, if the ships are outside the Harbour, water is supplied to them through barges, and the charge levied is at the rate of Rs. 8 per 1,000 gallons. During 1940-1948 there had been no levy of sales tax on the charges thus collected by the Port Trust, the Government having exempted the Port Trust from such levy. The exemption, however, was cancelled on 27th October, 1948. After some correspondence, the Deputy Commercial Tax Officer, Harbour Division, Madras, by his letter, dated 8th June, 1949, called upon the Chairman of Port Trust to pay tax on sale of water from 1st July, 1949. The Port Trust did not accept the claim; they, however, paid under protest a sum of Rs. 3,761-13-3 on the amount of Rs. 2,40,757 which was realised as charges for supply of water to the ships in the year 1948-1949. Thereupon, the suit, out of which this Second Appeal arises, was filed by them to recover the sum of Rs. 3,745, on the ground that the levy was unauthorised. The respondent contested the claim and stated that the levy was proper, as the Port Trust was a dealer who sold goods, and was, therefore, liable to be assessed to sales tax. They also contended that, under section 18 of the Sales Tax Act, a suit for recovery of the tax paid could not be instituted after a period of 6 months from the date of the order, and that, therefore, the suit was barred.

The learned First Additional Judge of the City Civil Court (later designated as the Assistant City Civil Judge) who tried the suit held that the Port Trust could not

* S.A. No. 1106 of 1956. 27th November, 1959.
(6th Agrahayana, 1881—Saka).

be deemed to be dealers, and would, therefore, not be liable to pay a tax. But he held that, as the suit was filed on the 23rd August, 1950, all payments made prior to a period of six months therefrom would be barred by limitation, and passed a decree for the payment made within the aforesaid period, namely, a sum of Rs. 1,554 with proportionate costs.

The State of Madras filed an appeal to this Court against the decree and judgment of the trial Court. The Port Trust filed a memorandum of cross-objections, claiming that they would be entitled to recover the entire sum collected from them by way of sales tax by the respondent. The appeal and memorandum of cross-objections were transferred by this Court to the City Civil Judge for disposal.

The learned Additional City Civil Judge held that, in purchasing water from the Corporation and levying charges therefor, the Port Trust would be a dealer within the meaning of section 2 (*b*) of the Madras General Sales Tax Act, as, in his opinion it was not necessary that there should be an element of profit in the transaction. The learned Judge disagreed with the view of the trial Court on the question of limitation, and held that, as the entire claim was within the period limited by Article 62 of the Limitation Act, there would be no bar of limitation. In the view that the levy was authorised by the statute, the learned Judge allowed the appeal, and dismissed the memorandum of cross-objections. The Port Trust of Madras had, thereupon, filed this Second Appeal against the decree and judgment of the lower Appellate Court.

Section 3 of the Madras General Sales Tax Act (which will be referred to as the Act) enacts that every dealer shall pay for each year a tax on his total turnover for such year. Section 2 (*b*) defines a dealer as "any person who carries on the business of buying or selling goods." Section 2 (*h*) defines "sale" as "transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration...."

To appreciate the case of the appellant, it is necessary first to ascertain the purpose for which the Port Trust is established, its powers and duties. The Port Trust Act was enacted for the proper working of the Madras Harbour by investing the control thereof in a body of persons, well acquainted with the affairs of the Harbour to whose judgment and experience the carrying out of the duties in connection with regulation, conservancy and improvement of the Port might be entrusted, and arming with adequate powers for the duties in connection with the aforesaid purpose. The Madras Port Trust Act is a consolidating statute. The Preamble to the Act states that the enactment was for the purposes of "regulation, conservancy and improvement of the Port of Madras." Section 6 enacts that the duty of carrying out the provisions of the Act would be with the Trustees of the Port of Madras who are to form a body corporate, having perpetual succession and a common seal. Section 31 of the Act vests the properties specified in Schedule II of the enactment and all moveable properties held by it, in the Board. The Act provides for the constitution of the Board of Trustees, their duties and powers. Chapter V invests the Board with power to execute works and perform certain services. There are also provisions in the Act, enabling the Board to impose and recover rates, to borrow, to expend, etc. Section 35 enables the Board to execute such works and provide such appliances as the Board may determine necessary or expedient for the purposes of the Port. Such works and appliances may include boats, barges and other appliances necessary in connection with the supply of water to ships in the Port, *vide* section 36 (9). Section 39 prescribes that the Board shall provide all reasonable facilities, and shall have power to undertake the services enumerated therein. Section 42 enables the Board to have a scale of rates at which and a statement of the conditions under which any of the services specified in the section shall be performed, and clause (*e*) relates to services, like supplying a ship with water. Under section 45, the Board has power to increase the rates to cover deficiency of revenue. Section 56 gives a power to the Board of Trustees to sell the goods in its custody for any rates due to it or in respect of any lien it might have. Section 60 enables the Board to apply for the distraint of a vessel which defaults in the payment of rates, charges or penalties. Sections 74 and 74-A

authorise the Board to spend the rent, income and other proceeds of any property on objects specified therein, and also to establish reserve fund.

From the provisions set out above, it is clear that the constitution of the Board and its powers are for the working the provisions of the Madras Port Trust Act in regard to regulation, conservancy and improvement of the Port of Madras, and that it is not conceived as a commercial body for making profit by sale of goods. The provisions, to which we have made reference, no doubt, authorise the levy of certain rates and charges by the Board. These charges are for the services rendered, and notwithstanding the fact that the Board could increase the charges so as to balance its budget, it cannot be held that the Board is constituted a trading corporation or is one authorised to carry on the business of buying and selling goods.

On behalf of the appellant, it was contended that water could never be the subject-matter of a sale, as it would not be goods within the meaning of the Act or the Sale of Goods Act. Reliance was placed for this contention in a passage contained in Mulla's commentary on the Sale of Goods Act, at page 13, and to the observations in *Rash Behari* v. *Emperor*[1]. It is unnecessary, however, to consider whether the authorities referred to above had in view only running water or water impounded and reduced to a person's possession as well.

Under the Act, it is not the sale by any person that is rendered liable to tax. The sale should be by a dealer as defined in the Act, one who buys and sells goods with the object or intention of making a profit, whether the object has ultimately been achieved or not. In *Gannon Dunkerley and Company (Madras) Ltd.* v. *State of Madras*[2], the assessee which was carrying on business as Engineering contractors, supplied foodgrains to its employees and recovered the cost of the goods supplied by debiting the same against the wages earned by them. It was found that there was no element of profit in the transaction and the scheme of supplying foodgrains was an ameliorative one, not intended as a business. A Division Bench of this Court, to which one of us was a party, held that the word, 'business', employed in the definition of a dealer in section 2 (*b*) was used in the sense of buying and selling goods with a view to earn profits and should be understood in a commercial sense. The view that there should be a profit motive in order that a person carrying on the business might be termed a dealer coming with in the scope of the Act was reiterated in *Sree Meenakshi Mills Ltd.* v. *State of Madras*[3], where a spinning mill which ran a canteen for the benefit of its employees was held not to be a dealer so as to be liable to sales tax. The question was again considered and the view taken in the *Gannon Dunkerley Case*[2], was upheld by the decision of another Bench of this Court in *Deputy Commercial Tax Officer* v. *Cosmopolitan Club*[4]. Balakrishna Ayyar, J., observed at page 16:—

> " After the examination of the language of the statute and the authorities we are clear in our minds that only commercial activities whose goal is profit whether that goal be reached or not are caught by the definition ".

In supplying water to the ships that call at the Port of Madras, the Trustees of the Port Trust are only discharging a statutory duty imposed upon them by the Act, and it cannot be held that they are doing any business so as to make them a dealer within the terms of section 2 (*b*) of the Madras General Sales Tax Act. No profit motive could be implied in the levy of charges for the water supplied to the ships. In the present case it is implicit in the finding of the lower Court, that there was no actual profit; even if it were to be found that there was a profit, we are of opinion that the obligation to supply water and right to charge therefor the ships which take the water was by virtue of a statute, whose object was to regulate the working of the Port at Madras and not to establish a profit-earning business. The provisions of section 42 (*e*) show that the levy of charges in respect of water supplied is for services rendered. On behalf of the respondent reference was made to the provisions of section 45, which invest a power in the Board of Trustees to increase the rates to the extent specified in the section: it was argued that the provisions of the section con-

1. A.I.R. 1936 Cal. 753 at 766.
2. (1955) 1 M.L.J. 87 : 5 S.T.C. 216.
3. (1955) 1 M.L.J. 104 : 5 S.T.C. 291.
4. (1955) 1 M.L.J. 189 : 6 S.T.C. 1.

templated a profit being made, to enable the balancing of the budget of the Port Trust, and that, therefore, the object of the levy could not be held to be free from profit motive. We cannot, however, agree with the contention. The supply of water to a ship is a service to be rendered by the Port. Sections 42 to 44-A clearly indicate that the rates levied are for services rendered. Even assuming that the power granted under section 45 would enable the trustees to levy a fee higher than what it could cost them to render the services, with the object of raising funds for meeting the expenditure on other objects, still the levy would not amount to an attempt to make a profit. The statute has prescribed the conditions and limits within which the increase in the rates could be made and this would indicate that a limited power is delegated to a local authority to levy a fee for a specified purpose.

But there may be cases where a statutory Corporation is allowed to carry on business with a profit motive. In such a case, though the rights and duties are defined by the statute, the Corporation would be a dealer liable to be taxed on its sales or purchases. An instance in point is the case reported in *India Coffee Board* v. *State of Madras*[1], where it was held that the Coffee Board would be liable to pay sales tax on its turnover. The India Coffee Board was constituted by the Coffee Market Expansion Act, 1942, with a view to pool the coffee grown by the producers, sell the same at a profit and distribute the proceeds to the growers. Under the provisions of the Act, the Coffee Board became the owner of the goods, as soon as the coffee grown by the individual producers were surrendered to the pool, and the Board sold the goods for a profit at the best possible price. The entire profits earned, except to the small extent which could with the sanction of the Central Government be diverted to the general fund, were distributed to the producers. It was held that the Coffee Board would be a dealer within the scope of the definition in section 2 (*b*) of the Act. That decision accepted the principle that in order to constitute a business within the meaning of section 2 (*b*) of the Act there should be a profit earning motive ; but it was not necessary that it should have the intention of appropriating the profits to itself ; the motive to earn profit would be there even if such profits were to be distributed to the persons for whose benefit the statutory Corporation was constituted.

The Port Trust Act does not constitute the Board of Trustees of the Port Trust for the purpose of carrying on any business in buying and selling with a view to make a profit. There would, therefore, be no liability on their part to pay sales tax on the charges collected in respect of the water supplied by it to the ships. The view of the lower Court on this point cannot, therefore, be sustained.

But on the other question, namely, the scope of section 18 of the General Sales Tax Act, we agree with the lower Court that the provisions of the section would not be applicable to suits for recovery of amount illegally collected as sales tax, and that the rule of limitation applicable therefor is that contained in Article 62 of the Limitation Act. Vide *State of Madras* v. *Abdul Kader*[2]. The appellant would, therefore, be entitled to a decree for the entire amount claimed. The appeal will be allowed with costs throughout.

R.M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Sakthi *alias* Thayammal .. *Appellant**

v.

Kuppathammal and another .. *Respondents.*

Guardians and Wards Act (VIII of 1890), sections 29 and 31—Permission to sell minor's property—Consideration—Evident advantage to the ward—Sale of cultivable land belonging to minor in anticipation of land ceiling legislation—If permissible.

In considering whether the permission sought for by a guardian for sale of the ward's property should be granted or not a broad view must be taken of the concept of what is a measure to the benefit

1. (1954) 2 M.L.J. 244 : 5 S.T.C. 292.

2. (1953) 2 M.L.J. 181.

* A.A.O. No. 301 of 1959. 9th March, 1960. (19th Phalguna, 1881—Saka).

of the estate of the minor. Though it is not possible to lay down any hard and fast rule as to the factors which a Court could take judicial notice of in deciding what a prudent man would do, still where it is clear that the policy of the Government was to impose a ceiling on land holding and that legislation in that regard was imminent and surplus lands taken over may not be given adequate compensation on the basis of the present market value, it is certainly open to the guardian, as a prudent man would do in his affairs, to dispose of the surplus lands at the best possible rate. Such a move is not opposed to public policy and the Court will be justified in granting permission to sell such surplus lands as may be found necessary as it will be for the benefit of the minor.

Appeal against the Order of the District Court of Coimbatore, dated 5th December, 1959 and made in I.A. No. 1289 of 1959, in O.P. No. 67 of 1953.

R. Gopalaswami Ayyangar, and *S. Ramalingam*, for Appellant.

The Advocate-General (*V. K. Tiruvenkatachari*) and *V. Ratnam*, for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Appeal raises a question of great contemporary significance and some legal interest, though the facts themselves are extremely simple. The facts are that in I.A. No. 1289 of 1959 in O.P. No. 67 of 1953 on the file of the learned District Judge of Coimbatore, the present appellant (the property guardian of a minor) sought, under section 29 of the Guardians and Wards Act (VIII of 1890), for permission to sell 55 standard acres of the lands belonging to the minor. The legal principles which are applicable to the matter are clear, and not in dispute. The interest of this case arises, not from any difficulty with regard to the interpretation of the sections of law, but from the peculiar and exceptional grounds upon which necessity for alienation was sought to be based. Section 31 of the same Act lays down that such permission ought not to be granted by the Court "except in the case of necessity or for an evident advantage to the ward." Section 31, sub-sections (2) and (3) relate to the requirements that the order granting the permission should recite the necessity or advantage, and that conditions of special kinds may be attached to the permission of Court, at its discretion. We may conveniently note two other sections of the Act here. Section 27 lays down that a guardian of the property of the ward,

"is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property".

In other words, the guardian certainly has the power to alienate the property of the minor, if the conditions of prudence or necessity or benefit to the estate requires such alienation. Again, it is laid down under section 30 that

"a disposal of immovable property by a guardian in contravention of either of the two last foregoing sections (28 and 29) is voidable at the instance of any other person affected thereby".

In other words, the transaction is only voidable and not void, and there is no dispute that the Court should therefore grant the permission under section 29, if the proposal satisfies the test under section 31 (1) of "necessity or for an evident advantage to the ward."

In the present context, the property guardian (the appellant) filed this petition because of an impending piece of legislation fixing a ceiling upon the possession of landed property by any single individual in the State. Here, the facts are not in dispute that a declaration of the intentions of Government in this regard was made upon the floor of the Legislature, and that it was generally publicised that this land reform was imminent, and that the ceiling would be fixed at 30 standard acres or so. Further, the appellant had adequate grounds for the belief that compensation might be awarded only at Rs. 1,000 per acre for the lands taken over by Government, this amount also being distributed in payment over a period of years.

The appellant submitted to Court that the lands of the minor above this ceiling, consisting of both *nanja* and *punja* could be sold at current market value for Rs. 3,000 to Rs. 5,000 per acre. If this was not immediately done, the estate of the minor would suffer great injury if the land reform legislation were enacted, and the surplus of the estate above 30 acres or so taken away by Government, at the anticipated

rates of compensation. This was, in brief, the broad grounds of the proposal. It appears to be indisputable that other persons owning such lands, who were *sui juris* and who could thus take effective action without formal Court proceedings, were actually engaged in reducing the sizes of their estates by sales, in conformity with the anticipated law.

In a brief order, the learned District Judge dismissed this application. He gave two grounds, therefor. The first was that "nothing definite is known about the anticipated legislation." The second was that the avowed object appeared to him to be to get over the legislation, which might even amount to contravention of a public policy. The learned District Judge added : " No Court can countenance such a proposal". The petition was dismissed with these observations.

I think that very little discussion is needed to show that the reasoning of the learned District Judge is fallacious, and that both grounds given by him for refusal of the permission are unsustainable. Firstly, it appears to be indisputable that this legislation is impending or imminent, and that its broad outlines at least have been publicly declared by the authorities of Government at the highest level. The learned Advocate-General for the respondents (the other relatives of the minor) who opposed the proposal, expressly concedes this. It is also not disputed before me that the ceiling is likely to be fixed at about 30 acres per individual, as far as the existing declarations of policy permit us to make a forecast at all. An argument is possible that, even so, it cannot be said that the immediate sales of the surplus extents of the estate, which would more or less be forced sales at current market value, are likely to be of great advantage to the minor, because, in any event, the State will pay compensation for the lands taken over. But this argument does not stand scrutiny. My attention has been drawn, not merely to certain passages in "The Indian Land Problem and Legislation" by G.D. Patel (1954 Edition, p. 508) setting forth this particular scheme of land reform, together with the ceilings proposed in respect of different States, but also, to what is surely more authoritative, paragraph 42 at page 197 of the "Second Five, Year Plan " (Government of India, 1956) giving the principles on which compensation is to be assessed in such matters. Actually, the learned Advocate-General has conceded that though the Land Reform Bill has not been introduced in Madras State, drafts of similar Bills introduced in other States are available at the moment. According to the authoritative statement of the principles upon which compensation may be paid, it might either be specified amounts related to different clauses of land, or in terms of a multiple of land revenue, or in some other manner. In brief, it may not necessarily approximate to market value at all. Again, it seems to be indisputable that such compensation will not be justiciable because of Article 31-A of the Constitution. We find that the Select Committee omitted the reference to 'agricultural holdings' with regard to the amendment Bill introduced in Parliament on 20th December, 1954, on the ground that this was unnecessary because the further amendment proposed would place questions as to the adequacy of compensation outside judicial review. Consequently, the following inferences are undeniable, and well established. Firstly, the reform itself is imminent, probably fixing a ceiling of about 30 acres, and, secondly, the compensation may be nowhere near the market value of Rs. 3,000 to Rs. 5,000 per acre, which is the rate alleged ; it may be on a quite different basis altogether, and while it may quite probably be Rs. 1,000 an acre, the actual rate proposed in certain declarations of Government, it will not be subject to judicial review.

In brief, these facts clearly show that it is greatly to the benefit of the estate of the minor that the surplus lands should be now sold and the income realised and invested in other forms, such as cash securities, etc. A broad view must be taken of the concept of what is a measure to the benefit of the estate of the minor. It is sufficient here to refer to the expositions in *Hanuman Prasad's case*[1], in *Palaniappa* v. *Deivasikamani Pandara Sannadhi*[2] and in *Jagatnarain* v. *Mathuradas.*[3]

1. (1856) 6 M.I.A. 393 at 423-24.
2. (1917) 33 M.L.J. 1 : L.R. 44 I.A. 147 : I.L.R. 40 Mad. 709 a 1718 (P C.).
3. (1928) I.L.R. 50 All. 969.

There is, therefore, no doubt whatever that the permission sought was upon justifiable ground, that it related to an event at least as most events which would impel a prudent man to take immediate action to preserve his estate from injury, or to retain some benefits with regard to it, and that the suggested sales were justified by benefit to the minor in a very real sense. Obviously, there cannot be any hard and fast rule laid down in all such matters, of the material which a Court would take judicial notice of, in judging benefit. But, certainly, in the present instance, there is material of an objective and authoritative nature which would justify the Court in considering the proposed land reform fixing a ceiling, and the probable trend of compensation, as reasonably certain.

The argument of the learned District Judge that this is opposed to the spirit of the legislation, and amounts to some kind of circumvention of the law, is clearly based on a misconception. On the contrary, the sales, by private owners of land, of surplus areas over the probable ceiling are, by themselves, an effective instrumentation of the reform. This is a mode by which a more equitable distribution of landed property is effected, even before the enactment itself comes into force. Had it been otherwise, the State would have declared prohibition similar to a moratorium upon sales of land, which it has advisedly refrained from. To anticipate a law, and to take certain measures dictated by prudence, which are legally permitted, is not at all in contravention of public policy.

Upon this aspect of ths case alone, which is a matter of contemporary significance and legal interest, I have not been able to find any precedents in this country. But, there is a very interesting decision reported in *Morgan* v. *Tata and Lyle Limited*[1], which involved the judicial consideration of a very similar situation. The sugar industry was proposed to be nationalised, and legislation was imminent. A company engaged in sugar-refining incurred expenses in propaganda to oppose the threatened nationalisation. The question was whether these expenses could be considered as money laid out for purposes of the company's trade, and an admisible deduction from profits for income-tax purposes. The Law Lords held that the object of the expenditure being to preserve the assets of the company from seizure, and so to enable it to carry on it could be properly claimed as an admissible deduction from profits for income-tax purposes. In other words, the question cannot be judged upon the plane of the ethics of nationalisation at all. It ought to be judged from the standpoint of the company, so long as the expenditure was neither illegal nor in contravention of public policy. In the present case also, I think it is clear that the question ought to be judged from the standpoint of benefit to the estate of the minor. As I have already emphasised, there is nothing illegal nor opposed to public policy in the sale, by a landlord, of surplus extents of land, in anticipation of a land ceiling reform.

Consequently, I allow the Civil Miscellaneous Appeal to the extent of holding that the permission should be granted in the case, setting aside the order of the learned District Judge. The petition itself is remitted to the Court below for further disposal, in the light of these observations. The particulars of the precise extents of *nanja* and *punja* to be now sold, the rates at which, and the purchasers to whom, the sales should be effected by the property guardian and further the conditions to be attached to the permission under section 31, are all matters to be worked out by the lower Court after hearing all the parties concerned. But this must be done expeditiously, for, otherwise, the purpose of the permission will be frustrated. Under the circumstances, I direct the parties to bear their own costs.

R.M. *Appeal allowed.*

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1. L.R. (1955) A.C. 21.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

M. KN. N. Kannappa Chettiar .. *Appellant**

v.

S.P.P. Srinivasan Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 151—Inherent powers—Decree-holder bidding and setting off under Order 21, rule 72—Decree scaled down on appeal—Confirmation of sale in ignorance of the scaling down in appeal—Confirmation of sale illegal—Order 21, rule 92—Applicability.

The decree-holder, under Order 21, rule 72, Civil Procedure Code, bid and purchased the property of the judgment-debtor and set-off the purchase money against the amount due under the decree pending appeal. The decree was modified in appeal and the amount due under the decree as scaled down under Madras Act IV of 1938 was very much below the purchase money. In ignorance of the fact that the decree debt had been scaled down the Court confirmed the sale and recorded part satisfaction. The judgment-debtor filed an application under sections 47, 144 and 151 to set aside the sale and to order re-delivery.

Held, the Court in the exercise of the powers conferred by section 151, Civil Procedure Code, can declare that the order of confirmation of sale was illegal.

Any relief which the judgment-debtor may seek by reason of scaling down subsequent to confirmation would have to be sought on the basis of a sale which was duly confirmed and under which title had passed to the purchaser. The position is different if the order scaling down the debt to a level below the purchase money is passed before the confirmation of the sale. The sale cannot be confirmed unless the difference between the amount that has been set-off and the amount that is due under the decree is deposited by the decree-holder-purchaser into Court.

Rules 89 to 92 of Order 21, Civil Procedure Code, proceed on the basis that the purchase money is deposited in Court and where that is not done the basis of these rules goes and there can be no confirmation under rule 92.

Appeal against the order of the District Court of Ramanathapuram at Madurai, dated 7th September, 1957 and made in A.S. No. 57 of 1957 preferred against the Order of the Court of the Subordinate Judge of Sivaganga in E.A. No. 50 of 1956 in E.P. No. 116 of 1951 in O.S. No. 4 of 1942.

R. Gopalaswami Ayyangar, for Appellant.

M. Natesan, for Respondents.

The Court delivered the following

JUDGMENT.—The defendant-judgment-debtor in O.S. No. 4 of 1942 on the file of the Subordinate Judge, Sivaganga, was the appellant in the lower Appellate Court and is the appellant in this appeal.

One Panchaksharam Chettiar obtained a decree on 25th September, 1942, against the appellant's father for recovery of Rs. 3,300 odd in O.S. No. 4 of 1942 on the file of the Subordinate Judge, Sivaganga. The appellant's brother filed I.A. No. 18 of 1950 on 14th September, 1949, under section 19 of Madras Act IV of 1938 to have the debt scaled down. An order was passed in that application on 29th August, 1950, scaling down the debt to Rs. 2,100 odd. The appellant's brother preferred an appeal A.S. No. 3 of 1951 to the District Judge, Ramanathapuram, praying that the debt be scaled down to a lower figure. The District Judge passed an order on 20th August, 1951, not refusing merely the further scaling down that was prayed for, but disallowing altogether the appellant's claim to scaling down. He declared that the amount payable by the appellant and his brother under the decree was the amount due on the decree, dated 25th September, 1942, in accordance with its apparent tenor. That was a wholly wrong order to make because the respondents, the legal representatives of Panchaksharam Chettiar, who had obtained the decree, had themselves not appealed from the order passed by the Subordinate Judge scaling down the debt to Rs. 2,100 odd. The District Judge had either to accede to the request of the appellants's brother to have the debt scaled down further or to dismiss the appeal thereby

*A.A.A.O. No. 25 of 1958.

5th December, 1959.
(14th Agrahayana, 1881—Saka).

maintaining the debt at the level to which it had been scaled down by the Subordinate Judge in I.A. No. 18 of 1950. Against the Order of the District Judge, the appellant's brother preferred C.M.S. A. No. 29 of 1952 on the file of this Court.

On 26th October, 1951, that is about two months after the District Judge's order, dated 20th August, 1951, in A.S. No. 3 of 1951, the respondent filed E. P. No. 116 of 1951 for sale of the residential house of the appellant and his brother to recover Rs. 5,200 odd due on the decree dated 25th September, 1942. In C.M.S.A. No. 29 of 1952 the appellant's brother applied for stay of execution, but he was not able to furnish the security required. The execution proceedings in E.P. No. 116 of 1951 proceeded to the stage of sale. The 2nd respondent had obtained permission to bid at the sale and set-off the amount due on the decree. The 2nd respondent purchased the property at the Court sale held on 20th October, 1953, for Rs. 4,500. Since the amount recoverable on the decree as it stood on that date was over Rs. 5,000, the 2nd respondent set-off the purchase money against a part of the decree debt and paid only poundage. Confirmation of the sale was delayed by reason of proceedings which need not be set out here. While the sale was pending confirmation, C.M.S. A. No. 29 of 1952, which had been filed by the appellant's brother against the order of the District Judge, Ramanathapuram, in A.S. No. 3 of 1951, was allowed by this Court on 17th January, 1955 and the debt was scaled down to the level at which it stood, namely, Rs. 2,100 odd, under the order passed by the Subordinate Judge on 29th August, 1950 in I.A. No. 18 of 1950. The decree-holders did not report to the executing Court that the debt had been so scaled down. In the belief that a sum in excess of Rs. 4,500 continued to remain due on the decree, the executing Court passed an order on 24th September, 1955, confirming the sale and recording part satisfaction of the decree to the extent of Rs. 4,500: In due course, a sale certificate was issued and, in pursuance of the sale certificate, the decree-holders-purchasers took delivery of the property on 8th October, 1955. On 28th January, 1956, the appellant filed the application which has given rise to this appeal under sections 47, 144 and 151, Civil Procedure Code, praying that the sale which had been held in E.P. No. 116 of 1951 be set aside, that the property be redelivered to the appellant and that he be permitted to pay the decree amount in instalments as provided by Act I of 1955. The application was dismissed by the lower Courts. The appellant has hence preferred this appeal.

On 20th October, 1953, the date on which the sale was held, the amount recoverable on the decree exceeded Rs. 5,000. Even according to the appellant's case, an amount in excess of Rs. 1,500 was payable. Since the amount payable was not paid and there was no stay of execution, the sale had necessarily to be held. The decree-holders took the necessary steps for such sale and the sale which was held by the Court was legal. (Please see *Kuppa Sankara Sastri* v. *Kakumanu Varaprasad*).[1]

The 2nd respondent had obtained permission under Order 21, rule 72, to bid for and purchase the property and to set-off the purchase money against the amount due under the decree. The respondent's bid for Rs. 4,500 was the highest and the property was sold to the 2nd respondent. Since the amount due under the decree was in excess of Rs. 4,500, she set-off the purchase money against that part of the decree amount and paid only poundage. But confirmation of the sale was delayed until September, 1955. On 17th January, 1955., this Court had passed an order in C.M.A. No.29 of 1952 restoring the order passed by the Subordinate Judge on 29th August, 1950 and scaling down the debt to a sum far below the sum of Rs. 4,500 for which the 2nd respondent had purchased the property at the Court sale. The decree-holders did not bring it to the notice of the Court that the decree debt had been scaled down and that the purchase money exceeded the amount payable on the decree. In ignorance of the fact that the decree debt had been scaled down, the Court passed an order on 24th September, 1955 confirming the sale and recording part satisfaction as to Rs. 4,500. If the Court had known the facts relating to scaling down of the decree, the Court could not, on that date, have recorded part satisfaction to the extent

1. (1947) 1 M.L.J. 369.

of Rs. 4,500 of the decree on which very much less was due and would not have passed an order confirming the sale, unless the difference between the purchase money and the amount due on the decree had been deposited in Court. The point is whether the order of confirmation is legal.

That point is not covered by *Kuppa Sankar Sastri* v. *Kakumanu Varaprasad*[2], because, in that case, the order scaling down the decree debt was passed after the confirmation of the sale. In this case, if the decree debt had not been scaled down prior—indeed 8 months prior—to the order of confirmation, the order of confirmation would be legal. Any further relief which the judgment-debtor might seek by reason of scaling down subsequent to confirmation would have to be sought on the basis of a sale which was duly confirmed and under which title had passed to the purchaser. The position is different if the order scaling down the debt to a level below the purchase money is passed before the confirmation of sale.

Order 21, rule 72, enacts:

" (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly "

Sub-rule (2) of rule 72 lays the obligation on the Court to enter up satisfaction of the decree up to the amount of the purchase money which has been set-off. Such an order entering up satisfaction can be passed only on the date on which the sale is confirmed, because until the sale is confirmed, the decree-holder does not get title to the property (although when once the sale is confirmed title relates back to date of sale) and, therefore, until the sale is confirmed and he obtains title, his decree cannot be recorded as satisfied to the extent of the amount set-off. If, on the date on which the sale has to be confirmed, the amount that has been set-off is in excess of the amount due on the decree, satisfaction of the decree upto the amount set-off cannot be recorded. It follows that the sale itself cannot be confirmed unless the difference between the amount that has been set-off and the amount that is due on the decree is deposited by the decree-holder-purchaser into Court. That is because no purchaser at a Court sale is entitled to have his sale confirmed until the judgment-debtor is paid the price in full. Payment is usually by appropriation in satisfaction of the debt due to the decree-holder in execution of whose decree the property was sold and of other decree-holders if any, who have obtained orders of rateable distribution and realisation of the value for payment to the judgment-debtor or other persons entitled to receive the money by reason of transfers made by him. In a Court sale, there can be no purchase on credit. In a case where the amount due on a decree is varied to the judgment-debtor's advantage after the Court sale in execution of the decree and the amount as thus varied is less than the purchase money in a case in which the decree-holder purchases the property at the Court sale and sets-off the purchase money against the amount due to him, the sale cannot be confirmed unless the decree-holder invites the attention of the Court to the alteration made in the decree and deposits the difference between the purchase money and the amount recoverable under the decree as altered. The obligation lies on the Court to ensure that degree of justice to judgment-debtors whose properties are sold through Court by reason of their inability to pay their decree debt. That relief, judgment-debtors are entitled to under section 151, Civil Procedure Code.

The respondent's learned counsel contends that the sale was bound to be confirmed under Order 21, rule 92, in the absence of any application being made under Order 21, rule 89, rule 90 or rule 91. But those Rules, namely, rules 89, 90, 91 and 92, proceed on the basis that the purchase money has been deposited in Court subject to the proviso that where the purchase money is duly set-off, being equal to or less than the decree amount, the purchase money would be deemed to be deposited in Court. Where the purchase money is not so deposited, the basis of those rules disappears and there can be no confirmation under Order 21, rule 92.

1. (1947) 1 M.L.J. 369.

I hold that the order confirming the sale passed by the Subordinate Judge on 24th September, 1955 and recording part satisfactions as to Rs. 4,500 was illegal. That order is hereby set aside. The appeal is allowed to that extent. The Subordinate Judge will restore the E.P. to his file and will proceed to deal with it from the stage reached immediately before the order confirming the sale and recording part satisfaction was made. He will call on the decree-holders and judgment-debtors to file statements of the amount recoverable by the decree-holders under the decree as amended and ascertain such amount and will call upon the decree-holders to deposit in Court within a time to be specified the difference between the purchase money and the amount recoverable on the basis of the amended decree on the date of the sale. If the amount is deposited within the time allowed, the sale will be confirmed. If the amount is not so deposited, the sale will be set aside and a fresh sale will be ordered. Since the order confirming the sale is set aside, the judgment-debtor becomes entitled to re-delivery of the property, pending fresh order of confirmation. Such re-delivery will be effected on his paying the requisite fees. The appellant will have his costs in all these proceedings, *viz.*, in E.A. No. 50 of 1956, A.S. No. 57 of 1957, and in this appeal. The respondents will be entitled to recover in the execution petition full costs of execution inclusive of the costs of sale and poundage.

No leave.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Muniyammal, Proprietrix, Sarojini Bus Service, Krishnagiri, Salem District .. *Petitioner**

v.

The III Additional Income-tax Officer, Salem and another .. *Respondents.*

Income-tax Act (XI of 1922), section 54—Scope of—Certified copies of Income-tax returns required by contesting heirs of a deceased assessee—When could be granted.

Subject to the exceptions recognised in section 54 (3) of the Income-tax Act, the prohibition against disclosure of the statements made by an assessee is absolute and is intended for the benefit of the assessee. The assessee may, if he so chooses, waive the privilege conferred and there is nothing prohibiting an assessee from producing his returns in any Court. An assessee is entitled to inspect and obtain copies of his own returns and persons on whose behalf returns are submitted, as in case of partnerships or Hindu undivided family, would also be entitled to inspect and obtain copies of such returns.

But this rule will not apply to the case of the legal representatives of a deceased assessee. Where an assessee dies leaving more than one legal representative, the estate of the deceased will be represented by all of them and as such all of them should concur in applying for inspection or certified copies of the statements made by the assessee to the Income-tax Officer. No such inspection or copy could be given at the instance of one of them alone. Nor could it be said that there is any vested right in any legal representative to inspect the document as the right of inspection is only a privilege conferred on the assessee personally and it is not a transferable or heritable right.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition or any other appropriate writ, order or direction as the Court deems fit prohibiting the 1st Respondent from granting certified copies of the Income-tax assessment orders or other records relating to the Income-tax assessments of the late G. V. Rangaswami Naidu in F. No. 1675 on the file of the first Respondent herein to Kuppammal, Respondent 2 herein.

K. Srinivasan, *R. Narayanan* and *A. Devanathan*, for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of 1st Respondent, *T. Ramaprasada Rao*, for *Messrs. John and Row*, and *S. K. Damodaram*, for 2nd Respondent.

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* W.P. No. 753 of 1958.

6th January, 1960.
(16th day of Pausa, 1881—Saka).

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is a petition under Article 226 of the Constitution for the issue of a writ of prohibition or other appropriate writ, prohibiting the 1st respondent from granting to the 2nd respondent certified copies of income-tax assessment orders or other records relating to the income-tax assessment of one G. V. Rangasami Naidu.

G. V. Rangasami Naidu was an income-tax assessee who was running a bus service in Dowlatabad, Krishnagiri, Salem District. He died intestate on 21st October, 1956, leaving behind him his heirs, the first petitioner, his widow, a minor daughter, and the 2nd respondent, his mother. The widow entered into possession of the estate. She put herself forward as the proprietrix of the bus service, and she submitted returns to the income-tax authorities for the assessment years, 1956-57 and 1957-58. She was assessed to tax on the basis of the returns : the taxes have also been paid.

The 2nd respondent filed O.S. No. 3 of 1957 in the Court of the Subordinate Judge of Salem against the petitioner and her daughter, claiming partition of the estate left by her son, Rangasami Naidu. The bus service was one of the items of properties, in respect of which partition was claimed. With a view to establish her title to the properties, she applied, on 6th September, 1957, to the 1st respondent for the grant of certified copies of the income-tax returns filed by G. V. Rangasami Naidu and also the assessment orders thereon for the years 1951-52 to 1956-57. The petitioner does not want that the 2nd respondent should obtain the copies, and she has applied for the issue of a writ by this Court to prevent the 1st respondent from granting the copies.

The case for the petitioner is that she is the sole legal representative of the deceased, treated at any rate as such by the income-tax authorities, and that, therefore, the grant of the copies to the 2nd respondent would contravene the provisions of section 54 of the Indian Income-tax Act. That position is denied by the 2nd respondent. She claims that she is also one of the legal representatives of the deceased, Rangasami Naidu, being entitled to a share of the assets left by him, and that she, representing the estate of the deceased, would be entitled to the copies applied for. It is contended on her behalf that section 54 confers only a privilege on the assessee to treat the documents referred to therein as confidential, a privilege which could be waived by him, and she, standing in the shoes of the deceased, could exercise the same power, apply for the copies, obtain them and produce the same as evidence in the partition suit. In support of that contention, reliance was placed on the decision in *Rama Rao* v. *Venkataramayya*[1], where it was held that a profit and loss statement and one showing details of net income filed by an assessee in support of his return were public documents which could be proved by the production of certified copies, and that section 54 of the Indian Income-tax Act did not make the issue of a certified copy of income-tax return to an assessee illegal. It was also held that the assessee was not bound to treat the documents as confidential. In *Emperor* v. *Osman Chotani*[2], it was held that section 54 did not expressly enact that the documents referred to therein were inadmissible, but only provided that such documents, should be treated as confidential ; and that no Court could require a public servant to produce the same, but as the documents should be treated as confidential only in the hands of the Income-tax Officer, and not in the hands of other persons, it was open to an assessee to disclose the contents of the documents. A similar view was expressed in *Suraj Narain* v. *Jhabbu Lal*[3]. In *Buchibai* v. *Nagpur University*[4], the widow of a deceased assessee applied for and obtained certified copies of the statements made by the assessee to the income-tax authorities. The principal question decided was that it was open to the assessee to produce or allow production of those documents in Court. The right of the assessee to waive the objection for the pro-

1. (1940) 2 M.L.J. 257 : 8 I.T.R. 450.
2. I.L.R. (1942) Bom. 767.
3. I.L.R. (1944) All. 221.
4. (1947) 15 I.T.R. 150.

duction of the income-tax statements was held to inhere in his own widow, who, in that case, was the representative of his estate.

The decisions referred to above were not directly concerned with the question that has been raised in the present case, namely, in what circumstances certified copies of the statements could be given by the income-tax authorities after the assessee had died, and when there was a dispute between his heirs.

In terms, section 54 prohibits a disclosure by the officials of the Income-tax Department. A Court cannot require the documents mentioned in section 54 to be produced. Section 54, which, so far as it is relevant for the purpose of the present case, runs as follows :—

> " 54. (1) All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872 (I of 1872), no Court shall, save as provided in this Act be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.
>
> (2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition, or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine ".

Subject to the exceptions recognised in section 54 (3), the prohibition against disclosures of the statements made by an assessee is absolute. Likewise, a Court cannot require any public servant to produce the returns, accounts or documents or any part thereof. The provisions of the section were obviously enacted in the interest of the public and of the Revenue. It is obviously in the interest of the latter and of fairness to the assessee that he should be assured that the statements made by him would not be revealed to others. A full discolsure of a person's affairs may be attendant with the risk that it prejudices him in his business. The statute, therefore, contains stringent provisions in the matter of disclosure by rendering a breach thereof by a public servant punishable under section 54 (2). It must be noticed that the protection given by section 54 was for the benefit of the assessee. It would, therefore, stand to reason that he could, if he so chose, waive the privilege conferred on him. There would, therefore, be nothing objectionable in principle for him to disclose the contents of the documents mentioned in section 54 or produce the copies of the same in Court. The terms of that section, while it prohibits the Income-tax Officer from producing and a Court from compelling the officer to produce, cast no such disability on the assessee.

The assessee having himself made the return and produced the document, should be held entitled to inspect and/or take copies of the same. In paragraph 85 of the Notes and Instructions compiled by the Income-tax Department for the guidance of its officers, it is stated that the following persons shall, in practice, be allowed to inspect or to receive copies : (1) in any case the person who actually made the return ; (2) any partner (known to be such) in a firm registered or unregistered to whose income the return relates and (3) the manager of a Hindu undivided family to whose income the return relates, or any other adult member of the family who has been treated as representing it. In *Rama Rao* v. *Venkataramayya*[1], it was held that there was nothing in section 54 to prohibit the practice referred to in the Income-tax manual. That practice is the logical outcome of the principle that no matter could be confidential as against the very person who made the statements. What section 54 prohibits is the revealing of the confidential information, and there could be no revealing, if the party who made the statement is allowed to inspect the statement or obtain copies thereof. It may be noticed that the cases in which the department is allowed to grant the copies are those in which the person

1. (1940) 2 M.L.J. 257 : 8 I.T.R. 450.

who applied for inspection or copies is either actually or constructively the party who made such statements. In a case of partnership or a Hindu undivided family, the person who submits return or filed statements in support thereof would have done so only as representing the other partners or members of the family. It stands to reason that those persons on whose behalf the returns or statements were made should be entitled to inspect or obtain copies thereof: no question of breach of confidence will arise in such cases, and, therefore, there would be no contravention of the provisions of section 54.

Neither the rule nor the principle would apply where an assessee dies leaving certain legal representatives, and those legal representatives apply to inspect or take copies. In *Buchibai* v. *Nagpur University*[1], to which we have already referred, the widow of the deceased assessee obtained certified copies of the statements of her husband recorded during the assessment proceedings, and these were tendered in evidence by the plaintiff in that suit. The real question that had to be decided was whether those certified copies were admissible in evidence. While holding that section 54 of the Income-tax Act did not bar the reception of the evidence, the learned Judges also held that the widow of the deceased assessee was entitled to obtain the certified copies. In that case letters of administration had been granted to the University, the legatee under the will of the deceased, but the learned Judges were of the view, that as a representative of the estate of the deceased, his widow was entitled to obtain the copies. It is not necessary for us to record any concluded opinion of ours on the question, whether the principle laid down in *Buchibai's case*,[1]; is correct. The facts of the case before us distinguish it from *Buchibai's case*[1], there is a plurality of legal representatives in the case before us, and the disputes are *inter se* those representatives ; with those disputes the Department has nothing to do, and the certified copies have not been asked for to settle any disputes between the estate of the deceased assessee and the Department. Whether in such circumstances one of the legal representatives is entitled to obtain certified copies is the question for decision now, and *Buchibai's case*[1], is not authority for answering that question.

The question whether one of several representatives could obtain copies of those documents has, therefore, to be decided on principle. In a case where a person dies leaving more than one legal representative, the estate would be represented by all of them jointly, and not by one of them alone. As between co-heirs, it is well-settled that one is not the agent of the other. Section 24-B of the Indian Income-tax Act makes a legal representative of a deceased person liable to the tax assessed as payable by the deceased, the liability being however limited to the extent of the estate left by the deceased. The word ' legal representative ' in section 24-B, sub-clause (1), would mean all the legal representatives collectively, if there were more than one. The question of liability to income-tax where an assessee left more than one legal representative was considered by a Bench of this Court (to which one of us was a party) in *Alfred* v. *Income-tax Officer*[2]. It was held in that case that the .liability imposed under seetion 24-B (2) of the Act attached itself to all the legal representatives of the deceased person on whom notices were served, and that all the legal representatives of the deceased would be liable to be served with the notice under that provision. Therefore, when there is a plurality of legal representatives, it would follow that, all of them should concur in applying for the inspection of the statements made to the Income-tax Officer or for obtaining certified copies of the same from him. But where they do not agree, one of them alone could not be held to represent the deceased, and therefore, one of them alone could not have inspection. To recognise such a right might perhaps defeat the very purpose for which the section was enacted. Suppose an assessee had a business and had made certain disclosures to the income-tax authorities which in the hands of a rival would result in a prejudice to the business. If on the death, of the assessee his property vests in a number of his heirs, it should not be open to any one of the heirs to

1. (1947) 15 I.T.R. 150.
2. (1957) 2 M.L.J. 290.

ruin the business which might fall to the share of another by the simple process of getting copies of the statements made by the assessee and making them public.

The matter can be viewed on another line of reasoning as well. The right to inspect or to obtain copies is a privilege conferred on the assessee personally. It cannot be held that such a privilege is a property transferable or heritable on the death of an assessee. In Salmond's Jurisprudence, 11th edition, it is observed thus, at page 482 :

"The rights which a dead man thus leaves behind him vest in his *representative*. They pass to some persons whom the dead man or the law on his behalf has appointed to represent him in the world of the living. The representative bears the *persona* of the deceased and therefore has vested in him all the inheritable rights and has imposed upon him all the inheritable liabilities of the deceased. Inheritance in some sort is a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with the person whom he represents".

What, therefore, vests in the legal representative is the heritable right. It cannot be said that a mere privilege to inspect one's statement or obtain copies thereof would be a heritable right. Nor can it be held that one of several legal representatives could be considered as one in whom the personality of the deceased is continued so as to entitle him to obtain copies, which the assessee, had he been alive, would be entitled to do.

Yet another contention was urged on behalf of the second respondent. Reliance was placed upon section 76 of the Indian Evidence Act which would entitle every person, who has right to inspect a public document, to obtain copies of the same on payment of legal fees therefor. In *Rama Rao* v. *Venkataramayya*[1], it was held that an income-tax return or statement made by an assessee to an Income-tax Officer would constitute a public document within the meaning of section 74 of the Evidence Act. It was contended that being a public document, the 2nd respondent would be entitled to the copies under section 76. Section 76 does not specify as to who the persons entitled to inspect a public document are. But the section allows grant of a certified copy of a public document only to a person who has right to inspect the document.

It is, therefore, necessary to consider whether the 2nd respondent would be a person entitled to inspect the income-tax returns made by the deceased. There is no provision in the Indian Income-tax Act enabling a right of inspection of the income-tax returns or statements made in respect thereof. We have already pointed out that rule 85 of the Income-tax Manual relates to an inspection by the person who either actually or constructively made the return or the statement. It was contended on behalf of the 2nd respondent that, under the common law, the 2nd respondent, as one of the legal representatives of the deceased, would be entitled to inspect the documents. A reference was made to the decision in *King* v. *The Justices of Staffordshire*[2]. That was a case where certain rate-payers applied for a writ of *mandamus* against the Justice and Clerk of the Peace of a County to allow them an inspection of certain orders of sessions, concerning the expenditure of the county rate, evidently with a view to find out whether there had been any illegal expenditure of the rates already collected. Lord Denman, C.J., observed at pages 38 and 39 :

"It is alleged that these are public documents, and that every one having interest in them has therefore a right to inspect them..........But the difficulty is to see that the present applicants have such an interest as brings them within the rule. During the arguments, we enquired what interest in the applicants was relied on as entitling them to the inspection. In answer, it was conceded that the rate-payers had no direct interest in ascertaining the expenditure of the by-gone rate, because, even if discovered to be illegal, the money paid by the treasurer could not be recovered from him; and it is obvious that they could not be recovered from the parties to whom they had been paid, nor from the individual justices who had sanctioned the payments........

The utmost, therefore, that can be said on the ground of interest, is that the applicants have a rational curiosity to gratify by this inspection, or that they may thereby ascertain fact useful to them in advancing some ulterior measures in contemplation as to regulating county expenditure but

1. (1940) 2 M.L.J. 257 : 8 I.T.R. 450.
2. (1937) 6 Ad. and E. 84 : 112 E.R. (K.B.) 33 (38, 39).

this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records of any other county ; there is not that direct and tangible interest, which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents ".

In *Mutter* v. *Eastern and Midlands Railway Co.*[1], inspection of a Company's register was applied for by a shareholder who, it was proved, was serving interests of a rival company. The statute provided that a shareholder would have a right to inspect. It was held that the fact that the shareholder was serving the interests of the rival company would not disentitle him to the assistance of the Court in enforcing the statutory right. At page 106 Lindley, L.J., observed :

> " When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest".

It follows therefore that before a person could claim to inspect a public document, he should possess a direct and tangible interest in that document. An interest in some other matter which would be better served by the inspection of the document would not be sufficient. In other words, an inspection of the public document for the reason that the person would be able to advance his other interests would not be sufficient to constitute an interest in the document. For instance, a creditor of the assessee who may be anxious to secure his own interest or to realise his decree may like to get information about an assessee's business. It cannot be disputed that he would have no right to inspect the income-tax papers of the assessee, though in one sense he would have an interest in securing the information. Such an interest could be held to be neither direct and tangible nor one in the documents. The 2nd respondent has, no doubt, interest to secure a proper distribution of the properties of the deceased. That would not constitute a direct and substantial interest in the income-tax assessment and the statements. Such interest would exist only, for instance, if the 2nd respondent were liable to pay the tax or became entitled to any refund payable to the legal representatives of the deceased. We have referred to the provisions of section 24-B, sub-clause (1), which makes all the legal representatives of a deceased assessee liable for the tax payable by him. Section 24-B, sub-clause (2), enables the Income-tax Officer to serve notices on the legal representatives of a deceased, in case he has died without submitting his returns, and proceed to assess the legal representatives. In such a case, if there are more than one legal representative, notices should be served on all of them. In the present case, no proceedings were initiated by the Income-tax Officer against the legal representative for the assessment years 1951-52 to 1955-56. The returns were made by the deceased, and the taxes that were assessed had been paid by him, and there are no arrears to be paid. It is not a case where the assessments are to be disputed or any appeal has to be filed against the orders of assessments in respect of those years; they have become final. Under those circumstances, it cannot be held that the 2nd respondent has an interest in the income returns or statements made by the deceased for the assessment years 1951-52 to 1955-56.

For the assessment years 1956-57 and 1957-58, the petitioner voluntarily submitted returns. It may be that she was entitled to do so under section 26 (2) of the Indian Income-tax Act. But the fact is that the return was filed by her, not as representing the estate of the deceased, but in her own right, claiming as the sole proprietrix of the business. Such returns being filed by the petitioner herself, it would not be open to the 2nd respondent to have either inspection or obtain copies of the same. That apart, the returns have culminated in assessments and the taxes as assessed paid long prior to the date on which the 2nd respondent filed the application for the copies.

It was contended on behalf of the 2nd respondent that in the partition suit the petitioner might claim contribution or credit for the taxes paid by her as against

1. L.R. (1888) 38 Ch. Div. 92.

the other legal representatives and she would be entitled to know the amount of the tax levied, and she should therefore be held to have an interest in the income-tax papers. It is difficult to appreciate how the 2nd respondent could be held to have an interest in the income-tax returns, etc. If the petitioner wants to obtain contribution or to take credit for payment of income-tax made by her, she would have to show first how much tax was paid. Anyway, such an interest is only problematical and not either direct or tangible. The 2nd respondent would not, therefore, be entitled to the certified copies of the returns or the assessment orders thereon.

A writ of *mandamus* will, therefore, be issued to the III Additional Income-tax Officer, Salem, directing him to conform to the provisions of section 54 of the Indian Income-tax Act, and not to grant copies of the returns filed by late G. V. Rangasami Naidu and of the assessment orders for the years, 1951-52 to 1956-57 to the 2nd respondent.

Rule *nisi* is made absolute. In the circumstances of the case, there will be no order as to costs.

R.M. —— *Rule absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

V. S. Subramania Iyer and another .. *Appellants**

v.

Minor Sangili Veerappa Balasubramania Pandian *alias* Kutti Raja and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 45—Scope and effect of—Distribution of compensation money—Mode of—Share taken by sharers—If taken as divided property or joint family asset—Death of one of sharers—Devolution of sharers of deceased—Law governing—Right of son born after notification of estate and of illegitimate sons of deceased—Principal landholder having three sons and two wives and two illegitimate sons at time of notification—Subsequent birth of legitimate sons—Death of principal landholder—Devolution of share of deceased—Right of former three sons to succeed—Shares of undivided sons, illegitimate sons and widows—Hindu Women's Rights to Property Act (XVIII of 1937), section 3 (2)—Construction and scope—Illegitimate sons—If disinherited—Hindu Law—Succession.

Section 45 of Madras Act XXVI of 1948 regulates the rights of the various members of the family on the taking over of an impartible estate. Section 45 (6) creates a right to the compensation amount in the "sharers", namely, the principal landholder, his legitimate sons, grandsons, etc. No other person (barring the maintenance-holders) has any right to the compensation amount. Section 45 (6) provides that the compensation amount would be divisible among the members as if there had been a partition on the notified date. Whatever might be the rights of the principal landholder or his sons or grandsons, etc., in the impartible estate before the date of the notification, the compensation amount is treated as property owned by the sharers as if they constituted members of the joint Hindu family and the share of each of the sharers is determined as if there had been a partition between them on the notified date. But section 45 which enacts a fiction cannot be extended so as to effect a division among the members of the family in regard to other properties because neither the status of family nor its other properties are within its operation. At the same time the operation of the section cannot be belittled either, by holding that it has not done what it purported to achieve. So far as the compensation amount is concerned, the shares should be deemed to have been divided, but in regard to their other co-parcenary properties, they continue to be as before undivided. The position would be analogous to a case where members of a joint family are divided in regard to certain items of property but continue to remain in undivided status in regard to others so that the character of the undivided family property is taken away in regard to that part of the property which was the subject-matter of division, while, as regards the rest, the members would retain their joint status. The devolution on the death of a member, *quoad* the undivided property, would be by the rule of survivorship, and, *quoad* the divided property, by succession. The devolution or succession to the share obtained under section 45, would be on the basis of its being a divided item of property.

On the date of the notification of an impartible estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act, the principal landholder, *i.e.*, the Zamindar, had three sons, two by his first wife and one by his second wife besides his two wives. Subsequently another son was born

* S.T.A. Nos. 20 and 21 of 1957 and 32 of 1959. 25th January, 1960. (5th Magha, 1881—Saka).

to him by his second wife. Besides these he had also two illegitimate sons born of a continuously kept concubine, who too were in existence on the date of the notification. The estate was taken over on 3rd November, 1951. The zamindar died on 16th August, 1955, and a sum of Rs. 7,899, was deposited on 16th March, 1957, as interim payment for fasli 1365.

The junior widow of the Zamindar and her second son, born after the notification, applied to the Tribunal for payment of the deceased zamindar's share of the compensation amount on the ground that they were exclusively entitled to his share along with the other widow. A similar application was filed by the senior widow. To none of these applications were the illegitimate sons made parties. The applications were opposed by the assignees of the first two sons (by the first wife) who had transferred their interest in the compensation amount. The two illegitimate sons also filed an application claiming a third share of the Zamindar's share in the compensation amount. Their claim was opposed by the second wife of the Zamindar and her sons.

The Tribunal held that the three sons who were in existence on the date of the notification should be held to be divided sons as and from that date, with their father by reason of section 45 (6), and the 4th son born after that date being undivided would take by survivorship, subject to the right of the two widows under the Hindu Women's Rights to Property Act and that of the two illegitimare sons.

Held : (1) that out of the conpensation 1/5th share would go to the maintenance-holders, 3/5th share to the three sons of the Zamindar who were in existence on the date of the notification and that the other 1/5th share which represented the share of the deceased Zamindar would be taken by those on whom his interest in the amount would devolve under the law, there being no testamentary disposition by him ;

(2) that on the death of a sharer (the Zamindar) the distribution of his share of the compensation amount would not be governed by the Act, which did not provide it, but would be governed by the ordinary law governing succession, that is his share would devolve according to the Hindu Law ;

(3) that it could not be held that the two illegitimate sons of the deceased would get nothing because section 45 did not mention illegitimate sons. Under the Hindu Law, it would make no difference whether the 1/5th share in the compensation amount which belonged to the deceased be regarded as his separate property or joint family asset as between him and his undivided sons. In either case the illegitimate sons would be entitled to their proper share on his death ;

(4) that the 1/5th share to which the deceased became entitled under section 45 (6) should be held to be divided property in his hands and the persons entitled to take it on his death would be his undivided son (born subsequent to the notification), his two widows and his two illegitimate sons the other sons being treated as divided in respect of that item of property and therefore the first three sons of the deceased would have no interest in the 1/5th share of the deceased Zamindar ;

(5) that after the death of the father (Zamindar) both the legitimate and illegitimate sons would take as coparceners, but the latter in a partition would get only half of what they would get had they been legitimate ;

(6) that each of the illegitimate sons would be entitled to 1/8th share in the interest of the deceased in the compensation amount, both of them being together entitled to 1/4th ; each of the two widows would get 3/16th share (together 3/8th) and the undivided son would take the remaining 3/8th share in the 1/5th share of the deceased in the compensation amount.

It is no doubt well known that the Hindu Women's Rights to Property Act was intended to give better and larger rights to women and to the extent of securing them those rights certain inroads were made in the law of succession and joint family. But that does not mean that other heirs, namely illegitimate sons who had certain rights of inheritance as sons, lost such rights on the passing of that Act. Section 3 (2) of the Act does not have the effect of disinheriting illegitimate sons.

Case-law reviewed.

Appeal against the Order of the Estates Abolition Tribunal, Madurai, in O.P. No. 382 of 1957.

M. Natesan and *T. R. Mani*, for Appellants.

R. Sundaralingam, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—After taking over the Sivagiri Estate (which was an impartible estate) under the provisions of Act XXVI of 1948, the Government deposited a sum of Rs. 7,899 as an interim payment for fasli 1365. The deposit was made on 16th March, 1957. At the time when estate was taken over, that is, on 3rd January, 1951, the principal landholder, namely, the Zamindar was one Varaguna Pandian. The right to the compensation amount will be governed by section 45 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Act XXVI of 1948). Under that section the compensation amount is first

to be paid to the creditors of the impartible estate ; of the balance, not exceeding 1/5th is to be allotted to the maintenance holders, the remainder being divided amongst the sharers, as if they owned such amount as members of a joint Hindu family. The sharers would be (as defined in section 45 (3) of the Act) the Zamindar, his legitimate sons, grandsons and great grandsons in the male line. On the date of the notification Varaguna Pandian had three sons, two by his first wife and one by his second wife. Subsequent to that date, another son was born to him through his 2nd wife. Besides these, he had two illegitimate sons born through a continuously kept concubine, Chellappappal. The illegitimate sons were in existence on the date of the notification. The following genealogy can be usefully referred to, to elucidate the matter in controversy.

VARAGUNARAMA PANDIA CHINNATHAMBIAR :
(*died* 16—8—1955.)

Kannuthoy *alias* Muthathal Nachiar 1st wife.
- Senthattikalai Pandia Chinnathambiar
  - Two sons.
  - Ayila Raja *alias* S. Veerappa Pandian.

Samikannu *alias* Muthathal 2nd wife
- Nagamuthu Sankara Narayana
- Kutti Raja *alias* S. V. Balasubramania Pandian (Born after notification under Act XXVI of 1948).

Chellappappal *alias* Rajaratnam concubine.
- Chelladurai *alias* Thiru Arasu Pandian
- Swamidurai.

The compensation amount will, therefore, have to be divided between Varaguna Pandian, the principal landholder, his three sons who alone were in existence on the date of notification (leaving out of account for the present purpose the two sons of the first son who had also been born by then and who would be also sharers) and the persons who had claims for maintenance from the impartible estate. The latter category of persons, namely, the maintenance-holders, would be entitled to a fifth share in the amount. Out of the balance, Varaguna Pandian and his three sons would each take 1/4th with the result that the former would be entitled to have 1/5th share in the compensation amount. Varaguna Pandian died on 16th August, 1955. His interest would devolve on or vest in his coparceners or heirs, as the case may be (that is, whether his interest is considered as coparcenery or separate property). The two sons of Varaguna Pandian born of his first wife had assigned their interest in the compensation amount to V. S. Subramania Iyer and V. Muthuswami Iyer.

In O.P. No. 382 of 1957, the 2nd widow and her son, Kutti Raja who was born after the date of the notification, applied to the Tribunal for payment of Varaguna Pandian's share on the ground that they would be exclusively entitled thereto, along with the other widow, they being entitled to 3/4th and the senior widow 1/4th of the share of the deceased. A similar application was filed by the other widow, namely, the first wife of the deceased Zamindar, claiming 1/4th of the 1/5th share that belonged to Varaguna Pandian. To none of these applications, were the illegitimate sons of Varaguna Pandian made parties. The applications were, however, contested by the assignees of the first two sons. The Tribunal held that the 1/5th share of Varaguna Pandian would be taken by the two widows, each of them being entitled, to 1/4th share, the remaining half of a share being taken by Kutti Raja, the son born after the date of the notification. S.T.A. Nos. 20 and 21 of 1957 arise out of the order in the said applications, filed by the assignees of the first two sons of the deceased Zamindar.

O.P. No. 824 of 1957 was an application filed by the two illegitimate sons, namely, Chella Durai and Sami Durai, to the Tribunal claiming that they would be entitled to 1/3rd share of Varaguna Pandian in the interim compensation amount.

Their claim was opposed by the second wife of the late Zamindar and her two sons. The Tribunal held that the three sons of the Zamindar, who were alive on the date of the notification, should be considered as divided sons by reason of section 45 (6) of the Act, and that they would not be entitled to any rights in preference to the undivided son, Kutti Raja, and the two widows. The Tribunal further held that the two illegitimate sons would be entitled to the share to which they would be entitled under the Hindu Law: What they claimed was 1/3 of Varaguna Pandian's 1/5th share. The 2nd wife of the Zamindar and her two sons (who will be referred to as the appellants) have filed S.T.A. No. 32 of 1959 against the order of the Tribunal in O.P. No. 824 of 1957, claiming that the illegitimate sons of Varaguna Pandian would have no share in the compensation amount, including the interim payments.

It is not disputed that 1/5th share of the compensation amount would go to the maintenance-holder, 3/5th to the three sons of the Zamindar who were in existence on the date of the notification, and that the other 5th which represented the share of Varaguna Pandian would be taken by those on whom his interest in the compensation amount would devolve under the law, there having been no testamentary disposition by him. The question in the appeal is who are the persons that would be entitled to take 1/5th share of Varaguna Pandian and in what proportion.

The Tribunal held that the three sons who were in existence on the date of the notification should be held to be divided sons as and from the date thereof with their father by reason of section 45 (6) of the Act, and that the 4th son, Kutti Raja, being undivided would take the property by survivorship, subject to the right of the two widows under the Hindu Women's Right to Property Act, 1937, and that of the two illegitimate sons.

The contention on behalf of the appellants is that the illegitimate sons would have no such right. On behalf of the assignees of the first two sons, it is claimed that the notification would not have the effect of disrupting the joint family, that all the sons of the deceased Zamindar should be held to have continued as members of a joint Hindu family, and that, notwithstanding the fact the first three sons had taken their respective shares in the compensation, they, as undivided sons, would be entitled to take along with the rest Varaguna Pandian's share. This claim is contested by the appellants as well as the illegitimate sons.

It is first necessary to dispose of an argument raised on behalf of the appellants that, as the illegitimate sons would not be entitled to any share in the compensation amount under the provisions of section 45, they would have no right to Varaguna Pandian's share on his death.

Section 45, so far it is relevant for the present case, runs as follows :—

"(1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply;

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as a single group :

(*a*) the principal landholder and his legitimate sons, grandsons and great grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great grandsons adopted before such date (who are hereinafter called 'sharer') and

(*b*) other persons who, immediately before the notified date, were entitled to maintenance out of the estate and its income either under section 9 or 12 of the Madras Impartible Estates Act, 1904, or under any decree or order of a Court, award, or other instrument in writing or contract or family arrangement which is binding on the principal landholder (who are hereinafter called 'maintenance-holders')......................

(3) ....

(4) ....

(5) ....

(6) The balance of the aggregate compensation shall be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date".

It is contended that the impartible estate having been taken over by the Government, free from all encumbrances, the only right in the erstwhile landholder being what is provided for under the Act, the persons who will be entitled to share the compensation money would be those mentioned in section 45. And, as section 45 does not recognise an illegitimate son as a sharer, he would not be entitled to any portion of the compensation amount. The argument proceeds on a fallacy. The question now before us does not relate to the distribution of the compensation amount as such. There is no doubt that the right to the compensation amount will vest only amongst sharers, that is, the principal landholder and his legitimate sons, etc., as if there had been partition on the date of the notification. But once it has so vested, each one of the sharers would be entitled to what he obtained as his property, whether it be regarded a joint family property between himself and his sons, or as his separate property. When, therefore, one of the sharers died after the notified date, the distribution of his share of compensation amount could not be under the provisions of the Act. The Act does not provide for it, but it will be under the ordinary law governing testamentary disposition or succession, as the case may be. In the instant case, under the provisions of section 45, one fifth of the compensation amount would belong to Varaguna Pandian, as if there was a partition between him and his three legitimate sons on the notified date. When he died in 1955, that share would devolve according to the Hindu Law, the course of devolution varying, as the property is viewed either as separate or joint family property.

It is not disputed that, if the property is considered the separate property of Varaguna Pandian, the illegitimate sons would be entitled to a share. Even if that property were held to be joint family property as between Varaguna Pandian and Kutti Raja, the illegitimate sons would be entitled to a share. In Mulla's Principles of Hindu Law (12th Edition), dealing with the right of an illegimate son, it is stated at page 484 :—

" On the father's death, however, he succeeds to his estate as a coparcener with the legitimate son of his father, with a right of survivorship, and he is entitled to enforce a partition against the legitimate son ".

In *Raja Jogendra* v. *Nityanand*[1], there was an ancestral impartible estate. The Zamindar, who belonged to Sudra community, died leaving a legitimate son as well as an illegitimate son. On the death of the Zamindar, his legitimate son succeeded. But he died issueless. The question arose whether his father's illegitimate son could succeed to the impartible estate. The Privy Council held that the illegitimate son having survived the legitimate son would be entitled as a coparcener to succeed to the family estate, which was an impartible estate, on the death of his brother without male issue. In *Sham Rao* v. *Munnabai*[2], it was held that a *dasiputra* of a deceased Sudra Hindu could claim partition as against the legitimate son of his father (his half brother) in respect of the property which was ancestral in his father's hands. *Gur Narain Das* v. *Gur Tahel Das*[3], related to the succession to the separate property of a deceased Sudra. The Supreme Court held that, on the death of the father, the illegitimate son succeeded as a coparcener to the separate estate of his father along with the legitimate son with a right of survivorship *inter se* and would be entitled to enforce partition as against the legitimate son. *Vellaiyappa Chetty* v. *Natarajan*[4], related to a case where the father was himself a member of joint Hindu family. The question arose whether his illegitimate son would have any rights as against the other collateral members of the joint family, of which his putative father died as a member. It was held that, where the father left no separate property and died joint with collaterals, the illegitimate son would not be entitled to demand a partition as against those collaterals.

1. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 151 (P.C.).
2. I.L.R. (1948) Nag. 678.
3. (1952) 2 M.L.J. 251 : (1952) S.C.J. 305 : 1952 S.C.R. 869 (S.C.).
4. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).

But where the father died having been joint with his sons, the joint family consisting of himself and his sons or his other descendants, and there is no question of a collateral branch being joint or where the father left separate property, the illegitimate sons would be entitled to share along with the legitimate son. Therefore, it would make no difference whether the 1/5th share in the compensation amount to which Varaguna Pandian was entitled, be regarded as his separate property or joint family asset as between him and his undivided sons. In either case the illegitimate sons would be entitled to their proper share on his death.

It was contended on behalf of the assignees of the two sons that section 45 (6) would not have the effect of dividing the members of the joint family, and that, therefore, all the legitimate sons of the deceased Zamindar would be entitled to share what was left by him, namely, his interest in the compensation amount. If that contention were to be accepted, the share of each of the two illegitimate sons would be only 1/14th of 1/5th. It is now well-settled that the junior members of an impartible Zamindary are not coparceners and have no right in the impartible estate, except the chance of succeeding by survivorship to the estate after the death of the holder. Under the Madras Impartible Estates Act, there is a restraint upon the holder of the impartible estate for the time being from alienating the property. Except for that statutory restriction, the general law is that the holder of an impartible estate can deal with it by way of alienation or otherwise. He is also held to be the absolute owner of income from the estate. But where the holder of the estate died, succession to the impartible estate would be regulated by the rule of survivorship by treating the impartible estate as if it were joint family property. The impartible estate is, therefore, recognised as joint family property only for ascertaining who should succeed on the death of a holder.

It was contended that the share that was given to the sons under section 45 (6) was compensation of their chance of succession to the estate and not as a share in any joint family asset, and that, therefore, it could not be held that by reason of section 45 (6) there has been a partition between Varaguna Pandian and his sons.

The question whether the share of compensation which the sons of a proprietor obtained under section 45 (6) is a share of joint family property, and whether by reason of the statute there has been a partition between the proprietor and his sons, has to be decided on the terms of the statute. Section 3 (*b*) vests the entire estate, free from all encumbrances, in the Government, on a notification being made under the Act. Section 66 repeals the provisions of the Impartible Estates Act so far as the estate is concerned from the date when the Act came into force. The repeal of the Impartible Estates Act in regard to the estate does not mean that all the members of the joint family (that is even collaterals) would be entitled to a share in the compensation amount. Under section 3 (*e*) of the Act, the principal or any other landholder or any other persons whose rights stand transferred and determined under the provisions of the Act shall be entitled only to such rights and privileges as are conferred on him by the Act. Section 45 regulates the rights of various members of the family on the taking over of an impartible estate. Section 45 (6) creates a right to the compensation amount in the sharers, namely, the principal landholder, his legitimate sons, grandsons, etc. No other person barring the maintenance-holders) has any right to the compensation amount. In *Ranga Rao* v. *State of Madras*[1], a brother of the holder of an impartible estate taken over under the Act by the Government claimed the compensation amount as partible property. The learned Judges negatived the claim. Section 45 (6) states that the compensation amount would be divisible between the sharers, as if there is a partition on the notified date. Therefore, whatever might be the rights of the principal landholder or his sons in the impartible estate before the date of the notification, the compensation amount is treated as (1) property owned by the sharers as if they constituted members of the joint Hindu family and (2) the share of each of the sharers determined as if there had

1. (1952) 2 M.L.J. 243 : I.L.R. (1953) Mad. 479.

been partition between them on the notified date.. In other words, two results follow from the statutory provision ; (1) that the compensation amount is joint family property of the sharers and (2) that there had been a partition of that asset on the date of notification between them.

Section 45 which enacts a fiction cannot, however, be extended so as to effect a division between the members of the family in regard to other properties, for neither the status of the family nor its other properties are within its operation.

It was contended on behalf of the assignees that there could be no partition without a division in status. Reference was made to the decision of the Privy Council in *Girija Bai* v. *Sadashiva Dhundiraj*[1], in support of the contention that every partition should be the result of a division in status, and that as there had been no such division in status with respect to the compensation amount, provision of section 45 (6) could not be read as effecting a partition in regard to the compensation amount.

That however is not the way to approach the case. The statute which gives right to compensation amount treats it as a joint family property and also treats it as if there has been a partition of that property on the date of the notification. The statute creates a legal fiction for the purpose of compensating those persons, who, but for the Act would be entitled to certain rights in the impartible estate. So far as the principal landholder was concerned, his estate was taken over. So far as the sons and grandsons are concerned their chance of succession to the estate and their rights to maintenance have disappeared. In providing compensation for those persons, the statute creates a fiction by treating the compensation amount as joint family property. While that fiction could not be extended so as to hold that there was a partition in the family of the sharers, its operation could not be belittled either, by holding that it has not done what it purported to achieve. Therefore, so far as the compensation amount is concerned, the sharers should be deemed to have been divided, but in regard to their other coparcenary properties, they would continue to be as before, that is, undivided.

The position, then, will be analogous to a case where members of a family are divided in regard to certain items of property, but continue to remain in undivided status in regard to others. It has been held that it is open to the members of a joint family to sever their interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the property of the undivided family. The consequence in such a case would be that the character of the undivided family property will be taken away in regard to that part of the estate which was the subject-matter of division, while as regards the rest, the members would retain their joint status. See *Approviyer* v. *Ram Subba Aiyan*[2], and *Ramalinga* v. *Narayana Annavi*[3]. the relevant passage not being reported in the authorised reports). In such a case, the devolution on the death of a member *quoad* the undivided property would be by the rule of survivorship, and *quoad* the divided property, by succession. In our opinion, that rule would apply to the present case on the footing, that by reason of section 45 (6) there has been partition *quoad* the compensation amount, though there was no partition in regard to other properties. The devolution or succession to the share obtained in such a partition would be on the basis of its being a divided item of property. Therefore, the 1/5th share of the compensation amount, to which Varaguna Pandian, the deceased Zamindar, became entitled under the provisions of section 45 (6), should be held to be divided property in his hands, and the persons entitled to take it on his death would be, his undivided son, namely Kutti Raja, his two widows and his two illegitimate sons, the other sons being treated as divided in respect of that item of property. The first three sons of Varaguna Pandian will have no interest in the 1/5th share, to which, the deceased Zamindar became entitled under the provisions of section 45 (6).

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1. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 at 1046 (P.C.).
2. 11 M.I.A. 75.
3. (1922) 43 M.L.J. 428 : L.R. 40 I.A. 168 : I.L.R. 45 Mad. 489 : A.I.R. 1922 P.C. 201 at 205 (P.C.).

On behalf of the appellants, it was contended that by reason of section 3 of the Hindu Women's Rights to Property Act (XVIII of 1937) the illegitimate sons would have no rights in the property of Varaguna Pandian which should be deemed to be the joint family property as between him and his 4th son. Section 3 of Act XVIII of 1937 states as follows :—

"When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other School of Hindu Law or by customary law dies intestate leaving separate property, his widow or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son :

Provided that the widow of a pre deceased son shall inherit in like manner as a son if there is no son surviving of such pre-deceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such pre deceased son :

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son.

(2) When a Hindu governed by any Schools of Hindu Law other than the Dayabaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) *Omitted.*

(4) *Omitted.*

It is contended that under section 3 (2) the widow would represent the same interest as that of her husband, that as the illegitimate sons would not be entitled to any share or interest in the property during the lifetime of their putative father except at his choice, a similar disability would affect their claim during the lifetime of the widow. It was further contended that as the personality of the husband is deemed to inhere in the widow, the widow would take all the interest of her husband and there would be nothing left for the illegitimate sons to take.

That contention cannot be accepted. It is well known that the Hindu Women's Rights to Property Act, 1937, was intended to give better rights to women and to the extent of securing them those rights certain inroads were made in the law of succession and joint family. But that cannot mean that other heirs, namely, an illegitimate son who had certain rights of inheritance as a son lost such rights on the passing of that enactment. In *Ramaiyya* v. *Motiyya*[1], it was held that that enactment had not the effect of abrogating the other rules of Hindu Law. In *Alamelu Ammal* v. *Chellammal*[2], it was held that there was nothing in the enactment or in its intendment to create further inroads into the joint family or coparcenary property other than what was necessary for the purpose of giving certain rights in the property to the widow of the deceased person. We cannot accept the contention that the effect of section 3 (2) of the Act was to disinherit an illegitimate son. The provision in section 3 (1) which relates to separate property does not lead to any such conclusion. The purpose of section 3 (2) is to only confer on the widow the same share as that of her husband where partition is sought to be effected between her and her sons. The illegitimate son is in the position of a son, though the share to which he is entitled at partition would be half of what he would get if he were the legitimate son. Vide *Vellayappa Chettiar* v. *Natarajan.*[3] In a case where a person died a member of a coparcenary with his collaterals, the widow alone would get her husband's share but the illegitimate son would not. That is because the illegitimate son is not a coparcener with the collaterals while the widow who suffered under a similar disability before, got her rights secured under the statute. That question however does not arise here, for the property left by Varaguna Pandian would only be the joint family property of himself and his undivided son. In our opinion, the illegitimate son would be entitled to share in the inheritance along with the widows and the undivided son.

1. (1951) 2 M.L.J. 314 : I.L.R. (1952) Mad. 187.
2. (1959) 1 M.L.J. 269.
3. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).

The question, then is the quantum of share to which each of the parties would be entitled. It has been held that, after the death of the father, both the legitimate and illegitimate sons take as coparceners, but the latter in a partition would get only half of what he would be entitled to had he been legitimate. The widow would be entitled to a share equal to that of the legitimate son. Therefore, the 1/5th share which belonged to Varaguna Pandian will be taken by his two widows, his undivided son, Kutti Raja, and the two illegitimate sons. The Tribunal has divided that property equally between the three groups. In this, they were not correct. The share of each of the illegitimate sons would be half of what he would get had he been a legitimate son. It should, therefore, be held that each of them would be entitled only 1/8th share in the interest of Varaguna Pandian in the compensation amount and both of them together will be entitled to 1/4th and not 1/3rd. (*Vide* the illustration given at page 119 in Principles of Hindu Law, by Mulla). The remaining 3/4th will be divided between the widows and Kutti Raja, the undivided son, so that each of the widows would get 3/16th share and Kutti Raja 3/8th share of the 1/5th share of the compensation amount which the deceased Zamindar possessed.

The order of the Tribunal will be modified accordingly, and the case remanded to the tribunal for working out the reliefs to which the parties would be entitled. No order as to costs.

P.R.N. ——— *Order modified and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE SUBRAHMANYAM.

Kairum Bi and others .. *Appellants**

v.

Mariam Bi and another .. *Respondents.*

Mohamedan Law—Gift—Validity—Conditions—Delivery of possession—Proof—Doctrine of musha—*Applicability and scope—Mohamedan widow holding definite share in estate—Deed of settlement gifting same—Recital that she has divested herself of all interest and rights in property gifted and that donees would be entitled to work out settlor's rights in property gifted by appropriate proceedings—Effect of—Validity of dispossition—Pardanashin—Deed by—Essentials of validity—Independent advice—When necessary—Question of delivery possession—Plea by stranger—Sustainability.*

The Mohamedan Law does not require that to make a gift valid the donor must have physical possession of the property and must hand over that phyisical possession to the donee. It is enough if the donor has got legal possession of the property and transfers to the donee such possession as the latter is susceptible of. The possession of one co-heir is ordinarily possession on behalf of all. Possession of a co-owner or a co-tenant is a possession which has to be recognised by the law.

Where the donor, a Mohamedan widow, who was entitled to a one-sixth share in the estates of her two deceased sons clearly recited in a settlement deed that thereafter she ceased to have any interest in the property gifted and also expressly declared that the settlees (donees) "will be entitled to work out the settlor's rights in the property by taking appropriate proceedings", it must be held that in effect she gave the donees such possession as the property was capable of.

Such a gift cannot be said to be invalid on the ground of want of delivery of possession or on the ground of being a gift of undivided share on the basis of the doctrine of *musha*.

A definite share in immoveable property, zemindari, houses or shops is a separate estate with separate and definite rents. The rule of *wusha* which aims to prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate. If the owner of a definite share in immoveable property makes a gift of that share in favour of another person and has himself nothing left in that property after the gift, it can introduce no confusion at all.

The original rigidity of the rule of *musha* has been considerably relaxed in its application to modern conditions and effort has been to adapt the rule to the new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. If the donor has done all that the law of the land requires to be done to separate himself from the property, a gift of *musha* will be as valid as that of property which can be physically handed over to the donee.

Muhamad Mumtaz Ahmed v. *Zubaida Jan*, (1889) I.L.R. 11 All 460 ; *Ebrahim* v. *Bai Asi*, (1933) I.L.R. 58 Bom. 254 ; *Kaniz Fatima* v. *Jain Narain*, (1943) I.L.R. 23 Pat. 216 ; *Kalu Beg* v. *Gulzar Beg*, I.L.R. (1946) Nag. 510 ; *Mahomed Buksh Khan* v. *Hosseini Bibi*, L.R. 15 I.A. 81 : 1888) I.L.R. 15 Cal. 684 (P.C.) ; *Nazir Din* v. *Muhamad Shah*, A.I.R. 1936 Lah. 95, *Zahyran* v. *Abdus Salam*, A.I.R. 1930 Oudh 71 and *Syed Mohideen Sahib*, In re, (1957) 1 M.L.J. 346, followed.

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* Appeal No. 64 of 1956.

16th December, 1959.
(25th Agrahayana, 1881—Saka).

Musammat Bibi Bilkis v. *Shaikh Wahid Ali*, (1927) I.L.R. 7 Pat. 118 ; and Tyabji's Principles of Mohamedan Law, second edition, page 423, referred to.

The question whether delivery of possession has been effected under a gift is relevant only as between the donee and those who claim under him on the one side and the donor or those claiming under him on the other. Where the gift is otherwise proper and valid, a stranger cannot question it on the ground that there has been no delivery of possession.

Halimbi v. *Rahamatali*, I.L.R. (1941) Nag. 692 ; *Kalu Beg* v. *Gulzar Beg*, I.L.R. (1946) Nag. 510, relied on.

A gift made by a pardhanashin stands in a peculiar position. The disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. If the settlor's freedom and comprehension can be otherwise established or if the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice.

Farid-un-nissa v. *Mukhtar Ahmad*, (1925) 49 M.L.J. 758 : LR. 52 I.A. 342 : I.L.R. 47 All. 703 (P.C.) and *Inche Noriah* v. *Shaik Allie Bin Omar*, (1928) 56 M.L.J. 349 : A.I.R. 1929 P.C. 3 (P.C.), followed.

Appeal against the Decree of the Court of the Subordinate Judge of Cuddalore in O.S. No. 16 of 1954.

B. Pocker, *B. Moosakutty* and *M. S. Mahomed Yahia*, for Appellant.

T. R. Ramachandran, for Respondent.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—Defendants 1 to 9 are the appellants. Katheeja Bi, the 10th defendant, had three sons, Abdul Razack, Abdul Subbhan and Abdul Sukoor. Abdul Razack died in 1944. Abdul Subbhan died in 1947. Under the Mahomedan Law on the death of these sons Katheeja Bi became entitled to a one-sixth share in their estates. On 17th June, 1948, she executed a deed of settlement, Exhibit A-1 whereby she gave the one-sixth share which she inherited in the estate of Abdul Razak as also the one-sixth share which she inherited in the estate of Abdul Subban jointly to plaintiffs 1 and 2. The first plaintiff, Marian Bi, it may be stated is the only daughter of Katheeja Bi and the second plaintiff is the husband of Marian Bi. On the strength of this settlement deed the plaintiffs instituted O.S. No. 81 of 1948, on the file of the Subordinate Judge, Vellore, for the partition of the estate of Abdul Razack. The suit was compromised on 23rd January, 1950 and the plaintiffs obtained for themselves the properties set out in Exhibit B-2. In September or October 1950, the plaintiffs instituted the suit, out of which the present appeal arises, for partition and separate possession of the estate of Abdul Subbhan wherein they claimed a one-sixth share on the basis of Exhibit A-1.

The defendants put the plaintiffs to strict proof of the truth, validity and the execution of the settlement deed Exhibit A-1. They took the further plea that even if Exhibit A-1 is proved to be genuine and to have been executed by Katheeja Bi with complete comprehension of its contents still the settlement deed is void since it offends against various rules of Mahomedan Law. The learned Subordinate Judge ovrruled these contentions and decreed the suit as prayed for. Defendants 1 to 9 have therefore appealed.

It may be mentioned here that Katheeja Bi died in 1952 while the suit was pending in the trial Court and that no one has been specifically added as her legal representatives.

It seems to us that the genuineness of the settlement deed is beyond question. The evidence shows that Katheeja Bi went to the house of P.W. 1, a leading advocate of Vellore, and told him what she wanted to be done. He thereupon drafted the document Exhibit A-1 and it was typed in his office. A junior of his, who has subsequently become a Judicial Magistrate, made certain corrections in the document. Thereafter it was attested by three persons one of whom was P.W. 2. P.W. 2 deposed that at the time he gave evidence both the other attestors were dead. Katheeja Bi herself presented the document for registration and it was duly registered.

The next question is whether when Katheeja Bi executed the settlement deed she had a complete comprehension and full understanding of the nature of the document and the effect of the dispositions she was making.

Here it must be borne in mind that a gift deed executed by a pardanashin lady stands in a peculiar position. As explained in *Farid-un-nissa* v. *Mukhtar Ahmad*[1].

"The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it................. If, however, the settlor's freedom and comprehension can be otherwise established or, if, as is the respondent's case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice.

* * * * * * *

They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension ".

See also *Inche Noriah* v. *Shaik Allie Bin Omar*[2], where their Lordships observed :

" It is necessary for the donee to prove that the gift was the result of the free exercise of indepedent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing ; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption ".

Katheeja Bi was the first plaintiff in O.S. No. 81 of 1948 on the file of the Subordinate Judge, Vellore, and P.W. 1 Mr. Krishnaswami Ayyar was her advocate. While that suit was pending Katheeja Bi sent a registered notice to Mr. Krishnaswami Ayyar which as shown by Exhibit B-1 was received on 22nd August, 1949, at his residence. That notice is said to have been mislaid and Mr. Krishnaswami Ayyar could not produce the original. But D.W. 2 deposed that he had attested that notice and that so far as he could recollect it was to this effect : Katheeja Bi did not know the contents of the settlement deed. It was in English. She was asked to sign in it and so she signed in it. She desired one-sixth share to go to her son's sons. Mr. Krishnaswami Ayyar was asked not to go on with the case against the son's sons. The settlement deed appeared to be in favour of her daughter. She did not want her advocate to go on with the case on her behalf.

On the strength of this notice the argument was advanced that Exhibit A-1, must have been, even if genuine in the sense that Katheeja Bi actually executed it, obtained from her under circumstances that would not make it binding on her. Some fraud or deception must have been practised on her and her thumb mark obtained to Exhibit A-1. Otherwise, it was contended, such a notice would not have been issued at all.

Now, if the matter had rested just here and there were no other circumstances throwing light on the mind and conduct of Katheeja Bi one might probably have accepted the contention of the appellants on their part of the case. However, there are quite a number of circumstances pointing, and decisively pointing to a different conclusion. It must be borne in mind that we do not know the circumstances under which the notice referred to in Exhibit B-1 came to be sent by Katheeja Bi to Krishnaswami Ayyar. All that we knew is that about that time she was apparently living in the house of Abdul Shukoor. According to D.W. 2 it was Abdul Shukoor who sent for him to attest that notice. D.W. 2 saw Abdul Shukoor in the house in which Katheeja Bi was staying at the time she affixed her thumb mark to the notice referred to in Exhibit B-1. What influences had been brought to bear upon her at the time one does not know. But, it is perfectly clear that less than two months later Katheeja Bi sent Exhibit A-2 to Mr. Krishnaswami Ayyar completely repudiating her earlier notice. Besides she went on with the suit till it was compromised on 23rd January,

1. (1925) 49 M.L.J. 758 : L.R. 52 I.A. 342 : I.L.R. 47 All. 703 (P.C.).
2. (1928) 56 M.L.J. 349.

1950. Thereafter the present suit was instituted and Katheeja Bi chose to remain *ex parte*, which means in the context that she wanted the plaintiffs to succeed in their action. The subsequent conduct of Katheeja Bi constitutes a complete repudiation of the notice referred to in Exhibit B-1. Be it recalled that the deed of settlement was executed in 1948 and that Katheeja Bi died only in 1952, that is, some four years later. Except for the solitary notice evidenced by Exhibit B-1—and as we already stated we do not know the circumstances under which the notice came to be issued—the conduct of Katheeja Bi shows that for the remaining years of her life she stood by the settlement deed. This would never have happened if Exhibit A-1 had been obtained from her by coercion or by the exercise of undue or improper influence. It is also reasonably clear that at the time the document was prepared its contents must have been fully explained to her. She went to P.W. 1 and consulted him. He then prepared a draft in accordance with her instructions. It was typed in his office. A junior of his made certain corrections and amendments and it was thereafter that Katheeja Bi executed the document. P.W. 1 was asked whether Katheeja Bi was capable of understanding her actions at the time she executed Exhibit A-1 and whether it was read over to her and he then gave this answer :

"Yes. It must have been read over to her".

An Advocate in the position of P.W. 1 could hardly say more than this. It is impossible to expect a person in his position to have specific recollection about which particular document was read over to the person concerned.

The evidence of P.W. 2, an attestor of the document, however, makes the matter very much clearer :

"The document Exhibit A-1 was typed in Sri D. Krishnaswami Ayyar's office.

. . . .

Vakil D. Krishnaswami Ayyar wrote the draft. We four were present then. At the time no one else was present. The vakil after drafting, translated the writing to us and then handed the same to his clerk and directed him to type".

There is no reason why the evidence of P.W. 2 should not be believed.

Another important circumstance here is that the document was not prepared in a rush or hurry. From the village where Katheeja Bi lived with her son-in-law they went to Vellore in connection with this document. They appear to have spent at least two or three days at Vellore. It is also useful to bear in mind that if there had been any grounds for suspecting anything wrong or improper it is hardly likely that an Advocate of the standing of P.W. 1 would have proceeded further in the matter. One other circumstance which is not wholly devoid of significance is this. In Tamil districts Muslims do not observe purdha with the same rigidity and strictness as in some other parts of the country. Very often the purdha is a matter of form. In addition it must be remembered that at the time she executed Exhibit A-1 Katheeja Bi was advanced in years and in the case of such elderly persons there would not be the same insistence on the observance of purdha as in the case of girls and of young women.

Taking all the circumstances of the case we are satisfied that Katheeja Bi executed Exhibit A-1 with full understanding and comprehension of its contents and that the document did not incorporate anything which was not in accordance with her intentions.

Mr. Gopalaswami Ayyangar for the appellants argued that even so the settlement must fail for these reasons. Delivery of possession is essential to validate a gift of property under the Muhamedan Law. Katheeja Bi the donor was not in possession of any part of the property at the time she purported to make the gift deed, Exhibit A-1.

Since she was not in possession she could not naturally have given possession. Besides, Exhibit A-1 is a gift in favour of two persons jointly and such a gift is bad. What Katheeja Bi purported to make a gift of, was an undivided share in the estate

of each of her sons and the gift of an undivided share is bad. The transaction offends against every principle of Mahomedan Law relating to *mushaa*. Mr. Gopalaswami Ayyangar reinforced his arguments by referring to *Mussamat Bibi Bilkis* v. *Sheikh Wahid Ali*[1], where it was observed that the doctrine of *mushaa* is not an archaic rule of law and although not favoured, cannot be ignored or repudiated.

In dealing with these arguments it is well to bear in mind the following observations of the Privy Council in *Muhamad Mumtaz Ahmed* v. *Zubaida Jan*[2] :

> " The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules ".

The question whether a gift to two donees jointly is bad was considered in *Ebrahim* v. *Bai Asi.*[3] We quote the relevant passage :

> " There was a second argument placed before me, to the effect that 'A gift of property, which is capable of division, to two or more persons without dividing it, is invalid ; but it may be rendered valid of separate possession is taken by each donee of the portion of the property given to him......., I cannot accept this argument. The authority of the Fatawa Alamgiri and Hidaya is directly against it ".

This view was adopted in *Kaniz Fatima* v. *Jai Narain*[4]. On pages 221 and 222 Manohar Lall., J., observed :—

> " In the case of *Ebrahim* v. *Bai Asi*[3], Tyabji, J., has examined the subject at great length and I respectfully agree with his observations. I do not see why a donee of *mushaa* who has taken joint possession of the subject of a gift, and who finds it convenient and practicable to continue to hold that property without partition , should not be allowed to do so. All that the law is concerned to find is that before the validity of such a gift is declared, the donor must have parted with complete possession in favour of the donee, and then it is the lookout of the donee as to whether he wants a partitition or not. If the donor had partitioned the property and given it to a donee in a definite share, the donee could still hold the property as a tenant in common with his co-sharers and no question could have been raised regarding the validity of the gift. The same result, in my opinion, should follow provided the donee has been found to be in possession."

In *Kalu Beg* v. *Gulzar Beg*[5], it was held

> " When there is delivery of possession under a gift made jointly to two persons and the donees at some subsequent date either divide the property among themselves or arrange that one should have the entire gifted property, the doctrine of *mushaa* ceases to operate and that which was irregular in the beginning becomes valid ".

So far as we are aware there is no decision of this Court directly in point. We find ourselves in respectful agreement with the views of Tyabji, J., in *Ebrahim* v. *Bai Asi*[3], and of Manohar Lall, J., in *Kaniz Fatima* v. *Jai Narain*[4].

We would best observe that the rules of Mahomedan law do not require that to make a gift vaild the donor must have physical possession of the property and must hand over that physical possession to the donee. It is enough if he has got legal possession of the property and transfers to the donee such possession as the matter is susceptible of. In the present case when Abdul Razak died Katheeja Bi became a co-heir along with the widow and children of Abdul Razack. Similarly when Abdul Subhan died Katheeja Bi became a co-heir along with the widow and children of Abdul Subhan. The possession of one co-heir is ordinarily possssion on behalf of all. It must also be emphasised that in June, 1948, when Katheeja Bi executed Exhibit A-1 her claim to be the heir of her sons Abdul Razack and Abdul Subhan had not been challenged or called in question by any one. The possession of the other heirs was possession on her behalf also. And we may properly say that she was actually in possession of the estate. It was explained in *Kaniz Fatima* v. *Jai Narain*[4].

> " Possession of a co-owner or a co-tenant is a possession which has to be recognized by the law ".

In Exhibit A-1 Katheeja Bi distinctly stated that thereafter she ceased to have any interest in the schedule mentioned properties and she expressly declared that the settlees

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1. (1927) I.L.R. 7 Pat. 118.
2. (1889) L.R. 16 I.A, 295: I.L.R. 11 All. 460 at 475 (P.C).
3. (1933) I.L.R. 58 Bom. 254.
4. (1943) I.L.R. 23 Pat. 216.
5. I.L.R. (1946) Nag. 510.

"will be entitled to work out the settlor's rights in the properties described below by taking appropriate proceedings".

The only manner in which Katheeja Bi could have got physical possession of any part of the property was by instituting a suit for partition, and, under Exhibit A-1 she armed the donees with the requisite power. In effect, therefore, she gave the donees such possession as the property was capable of.

One other observation must be made. The reason for the rule that the gift of an undivided share is bad is to be found in the desire to avoid what has been described as confusion. If the property is capable of separate possession but nevertheless the donor does not separate what he intends to give from his other possessions, how is one to find out what he intended to give? And if we do not know what he intended to give, but still try to give something there is bound to be confusion. The reason of the rule is wholly absent in a case like the present where the donor gave away the entirety of her interest in the estate. It was held in *Zahyran* v. *Abdus Salam*[1]:

"A definite share in immovable property, zamindari, houses or shops, is a separate estate with separate and defined rents. The rule mushaa, therefore, which aims at prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate.

. . . .

We may legitimately ask as was asked by Lord Machnaughten in the case of *Mahomed Baksh Khan* v. *Hosseini Bibi*[2], what certain confusion can it introduce if the owner of a definite share in immovable property makes a gift of that share in favour of another person and has himself nothing left in that property after the gift? It seems to us that the only answer that can be given to this question is in the negative".

In *Nazir Din* v. *Muhammad Shah*[3], Din Muhamad, J., observed :—

"It will be manifest from the above that the original rigidity of the rule of *Musha* has been considerably relaxed in its application to British India and in almost all cases, which have come up before the Courts here as well as before the Privy Council, an effort has been made to adapt the rule to its new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. The Courts in this country have given effect rather to the spirit of the rule than to its letter and have upheld gifts in all cases in which the intention to give on the part of the donor had been expressed in most unequivocal terms, and had further been attended by all honest efforts on his part to complete the gift by divesting himself of the control over the property in such a manner as would clearly imply his divestiture in the eye of the law of the land.

The *raisen d'etre* of this rule was the avoidance of gifts that were vague, indefinite or incomplete, and the only test that should be applied in such cases is whether the gift in question is open to any of those objections; or in other words, whether the donor has still reserved to himself a loop-hole of escape or not. If this is not so and if the donor has done all that the law of the land requires to be done to separate himself from the property a gift of mushaa will be as valid as that of property which can be physically handed over to the donee".

The case in *Hamidullah* v. *Ahmedulla*[4], is also in point. The subject-matter of the gift there was undivided 7/32 share in 6 houses and 3 parcels of land. The donor was not in physical possession but only in constructive possession of the property. She executed a deed of gift and had it registered. The document recited that the donor was conveying to the donee the same sort of possession which she had. The gift was upheld. The Court observed :

"She admittedly had no physical possession but was in constructive possession through the plaintiff .... She however put the donee in a position to obtain possession and it is a fact as stated in the plaint that the defendant donee instituted a suit for his share of the rents on the basis of this deed of gift. ....Mst. Haliman did practically all that she was able to do in way of divesting herself of possession and giving to the donee-defendant the same possession as she had herself".

In Tyabji's Principles of Muhammadan Law (2nd Edition, page 423) the following passage appears :

"The Courts are inclined to uphold a gift of 'mushaa', *i.e.*, of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the

1. A.I.R. 1930 Oudh 71.
2. (1888) L.R. 15 I.A. 81 : I.L.R. 15 Cal. 684 (P.C.).
3. A.I.R. 1936 Lah. 95 and 96.
4. A.I.R. 1936 All. 473.

rest of it, is taken as an indication that there has been in effect, an incomplete transfer, which the donor would have completed by partition, had he intended to complete the gift".

This statement of the law was approved in *Musammat Bibi Bilkis* v. *Sheik Wahid Ali*[1] and in *Ebrahim* v. *Bai Asi*[2].

It will be appreciated that in the present case Katheeja Bi could not have done anything more whatever to complete the gift. There are certain observations in *Syed Mohideen Sahib*, In re[3], which are directly to point:

"Two points were raised by Mr. Parthasarathy Ayyanger, learned counsel for the appellant in this case. One is that the learned Judge, Basheer Ahmed Sayeed, J., erred in law in holding that the gift by the sedond defendant to the plaintiff of his share in the suit property was valid. The contention was that as the donee was entitled only to an undivided share, the gift was invalid because of the doctrine of mushaa under the Muhammadan Law. As the learned Judge observed, the prevailing view is that a gift of an undivided share which is capable of division is not void. Learned counsel for the appellant did not dispute this but argued that such a division could be made only by the donor himself and relied on the decision of the Lahore High Court in *Said Hassan* v. *Shah Hussain*[4].

In the case before us the facts are entirely different. The donor has made a gift of his entire interest to the plaintiff. That interest was a share in a property. It will not be possible for the second defendant to voluntarily effect a division and then deliver his share to the plaintiff.

In our opinion, if the gift is otherwise valid, in a case like this, there can be no impediment to the Court directing a partition between the donee in the right of the donor and the other sharer, the first defendant in this case".

One final observation must be made and it is this. The question whether possession has been delivered is relevant only when an issue is raised between the donee or those claiming under him on the one side and the donor or those claiming under him on the other. Where a gift is otherwise proper a stranger cannot invoke the rule that the gift is bad because there has been no delivery of possession. In *Kalu Beg* v. *Gulzar Beg*[5], Bose, J., observed :

"I have decided in *Halimbi* v. *Rahamatali*[6], that the question of delivery of possession is only relevant as between the donor and those who claim under him or her and the donee. If the donor upholds the gift then it is not open to strangers like the present defendants to question it on the ground of want of delivery of possession."

We think that this is the proper way of looking into the matter.

All the contentions raised by Mr. Gopalaswami Ayyangar fail. In the result, the appeal fails and is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Balasubramania Thevar *alias* Subramania Thevar and others .. *Appellants**

v.

Nallamuthu Moopanar and others .. *Respondents.*

Madras Agriculturists Relief Act (*IV of* 1938) (*as amended by Madras Act XXIV of* 1950), *section* 9-*A*, (9) (*a*) (1)—*Construction and scope of—Usufructuary mortgage and lease back—Rents paid by mortgagor under lease—Appropriation—Right to re-appropriate towards principal—Section* 8, Explanation I—*Applicability—Right of mortgagor—Section* 19—"*Court which passed the decree*"—*Meaning of—Decree confirmed or modified on appeal—Application under section* 19—*Jurisdiction of Court of first instance.*

Interpretation of Statutes—Statutory fiction—Duty of Court in giving effect to—Principles.

Under sub-section (9) (*a*) (1) of section 9-A, Madras Agriculturists Relief Act, 1938, as amended by Act XX of 1950, the rents paid towards the lease by the mortgagor who has taken the mortgaged properties back on lease, should be deemed to be the interest, and section 8 or 9 read with section 12 or 13, as the case may be, should be applied to scale down the debt. Such rents are obviously quite distinct from the interest paid by a debtor to a creditor, but the statutory fiction enacted by section 9-A, (9) (*a*) (1) assumes the identity where it does not exist. By the very virtue of the principle governing the legal fictions *Explanation* I to section 8 cannot apply to such a case.

1. (1927) I.L.R. 7 Pat. 118.
2. (1933) I.L.R. 58 Bom. 254.
3. (1957) 1 M.L.J. 346.
4. A.I.R. 1947 Lah. 272.
5. I.L.R. (1946) Nag. 510.
6. I.L.R. (1941) Nag. 669, 672.

* A.A.O. Nos. 263 of 1956 and 277 of 1956.

1st December, 1959.
(10th Agrahayana, 1881—Saka).

For the purpose of giving effect to the legal fiction the Court has to assume the existence of facts upon which the fiction could operate. But the Court cannot create further legal fictions which have not been enacted, in order to make applicable a certain state of rights which does not flow or follow from the assumption of the identity *per se* which the Legislature has actually enacted.

It must therefore be held that the debt is liable to be scaled down, assuming that the payments towards rent are to be regarded as payments towards interest. *Explanation I* to section 8 in particular cannot apply, because it has not been enacted that the person making the payments must also be deemed to have considered himself as a debtor repaying a creditor and deemed to have exercised a right of appropriating those payments in a particular manner, either by actually appropriating them towards interest in writing, or failing to do so. The Court cannot construct further legal fictions, which will have to be constructed before *Explanation I* to section 8 can be made applicable.

In dealing with a statutory fiction as applying to certain facts, the Court is entitled to and bound to ascertain, for what purpose the fiction was enacted, between what persons it should be operative, and how it should be given effect to ; and in giving effect to a legal fiction the corollaries of the assumed identity cannot be shirked, as it is not merely proper, but even necessary to assume the other facts also upon which the fiction can operate.

East End Dwellings Co., Ltd. v. *Finsbury Borough Council*, L. R. (1952) A.C. 109 ; *Income-tax Commissioner, Delhi* v. *S. Teja Singh*, (1959) 1 M.L.J. (S.C.) 154 : (1959) 1 An.W.R. (S.C.) 154: (1959) S.C.J. 425 : A.I.R. 1959 S.C. 352, applied.

R. v. *Norfolk County Council*, (1891) 60 L.J. Q.B. 380; Ex parte *Walton* in re *Levy*, L.R. (1881) 17 Ch. D. 746 ; *Commissioner of Income-tax, Bombay Presidency* v. *B. T. Corporation*, (1929) 58 M.L.J. 204 : L.R. 57 I.A. 21 : I.L.R. 54 Bom. 217 (P.C.) ; *The Provincial Government of Madras* v. *Neeli Veerabhadrappa and others*, (1950) 1 M.L.J. 564 : I.L.R. (1951) Mad. 257 and *Kalyanasundaram* v. *Muthuveera*, (1959) 72 L.W. 1, relied on.

Sections 19 and 20 of the Act have to be read together, and the explanation of the expression " Court which passed the decree " in section 20 equally applies to section 19. Even when an appellate Court had confirmed or modified the decree, still the Court to which an application lies under section 19 is the Court of first instance which passed the decree.

Lingappa Chettiar v. *Chinnaswami Naidu*, (1955) 1 M.L.J. 1 and *Ganga Raju* v. *Ramayya*, (1939) 49 L.W. 203, followed.

Appeals against the Orders of the Court of the Subordinate Judge, Madurai, dated 6th March, 1956 and made in I.A. Nos. 915 of 1955 and 1444 of 1951 in O.S. No. 14 of 1945 respectively.

R. Gopalaswami Ayyangar, for Appellants.

K. S. Desikan and *K. Raman*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—These are related appeals by respondents 1, 3 and 7 (defendants 1, 3 and 7) in an application under section 19 of Madras Act (IV of 1938) for further amendment of a decree obtained on the foot of a usufructuary mortgage. Broadly stated, the grounds urged are: (1) that the learned Subordinate Judge ought not to have proceeded to further amend the decree under section 9-A of the Act, which has actually resulted in an amendment at a higher figure, when this Court had earlier applied the provisions of the Madras Agriculturists Relief Act and scaled down the decree, (2) upon a correct interpretation of sub-section (9) (*a*) of section 9-A of the Act, the arrears of rent should be deemed to be interest for all purposes of sections 8, 9, 12 and 13 of the Act, and *Explanation I* to section 8 should therefore have been applied to the facts and (3) that, in any event, the prior payments made by way of rent or towards *kist* should all have been appropriated towards the liquidation of the principal of the debt, or at least the debt itself, and the rule of *damdupat* enunciated in the Act applied, to determine the reduced final liability. Actually C.M.A. No. 263 of 1956 relates to an order on an application by defendants 1, 3 and 7 (appellants) for a declaration that the entire preliminary decree debt had been discharged, and that no further liability remained.

The first ground of objection can be very simply dealt with. It is true that the preliminary decree made in this suit came up before this Court in A.S. No. 624 of 1945, and that it was modified by applying the provisions of the Act in the decree of this Court, dated 6th April, 1950 (Exhibit A-3). As the learned Subordinate Judge points out, in *Ganga Raju* v. *Ramayya*[1], a Division Bench of this Court has held that sec-

1. (1939) 49 L.W. 203.

tions 19 and 20 of the Madras Act IV of 1938 should be read together, and that the explanation of the expression 'Court which passed the decree' in section 20 equally applied to section 19. Hence, an application to amend the decree debt was properly made to the Court of first instance. In *Lingappa Chettiar* v. *Chinnaswami Naidu*[1], Govinda Menon, J., in delivering the judgment of the Division Bench, referred to the earlier citation, and observed that even where an appellate Court had confirmed or modified the decree, still the Court to which an application lay under section 19 was the Court of first instance which passed the decree. In the light of these authorities, the contention has no force that, because this Court originally modified the preliminary decree, no further application lay under section 19 of Madras Act IV of 1938 to the Court of first instance.

The next ground, and it is a matter which appears to be of some complexity and difficulty, is whether, by virtue of the language in section 9-A, sub-section (9) (*a*), *Explanation I* to section 8 should be applied to the present facts, so that all the payments have to be credited towards the principal. We shall immediately proceed to determine this matter, in the light of the admitted facts that this was a usufructuary mortgage with a lease back in favour of the mortgagor, as evidenced by the hypothecation bond and the registered security bond.

Section 9-A, sub-section (9) (*a*) (i), with which we are concerned, runs as follows:

" Except in cases falling under sub-section (5) (*a*), where the mortgaged property, or, as the case may be, the portion thereof in the possession of the mortgagee has been leased back to the mortgagor by the mortgagee, the rent due to the mortgagee under the lease (after deducting from such rent any revenue, tax or cess paid or payable by the mortgagee in respect of the property) shall be deemed to be the interest on the mortgage debt or the portion thereof attributable to the portion of the property aforesaid and the provisions of section 8 or 9 read with section 12, or section 13, as the case may be, shall apply to the entire debt ".

Explanation I to section 8 of the Act runs as follows :

" In determining the amount repayable by a debtor under this section, every payment made by him shall be credited towards the principal, unless he has expressly stated in writing that such payment shall be in reduction of interest. "

The problem now becomes clear, when section 9-A, sub-section (9) (*a*) (i) and *Explanation I* to section 8 are considered together. Under the former provision, the rents due to the mortgagee under the lease paid by the mortgagor "shall be deemed to be the interest on the mortgage debt ". The argument is that if this legal fiction is to be given effect to *Explanation I* to section 8 must also be applied to the facts, and all payments credited towards the principal, within the ambit of that rule.

The problem which confronts us, therefore, is, when the Legislature creates or constructs a legal fiction by virtue of such words as " deemed to be ", how far is that fiction to be operative ?

As Cave, J., observed in *R.* v. *Norfolk County Council*[2].

" Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is deemed to be and that notwithstanding it is not that particular thing, nevertheless............it is deemed to be that thing."

In *Commissioner of Income-tax, Bombay Presidency* v. *B. T. Corporation*[3], the Judicial Committee observed :

" Now, when a person is " deemed to be " something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were. "

Reference might also be made to *The Provincial Government of Madras* v. *Neeli Veerabhadrappa and others*[4], where the same dictum is quoted in the judgment of Viswanatha Sastri, J. In "Words and Phrases Judicially Defined" by Roland Burrow, Vol. II, 1943, the authorities are cited for the same purpose of proving that the use of such

1. (1955) 1 M.L.J. 1.
2. (1891) 60 L.J. Q.B. 380.
3. (1929) 58 M.L.J. 204 : L.R. 57 I.A. 21 : I.L.R. 54 Bom. 213 at 217 (P.C.).
4. (1950) 1 M.L.J. 564: I.L.R. (1951) Mad. 257.

words creates a legal fiction, though there is no actual identity, and the lack of identity is itself the condition upon which the legal fiction operates. Subrahmanyam J., in *Kalyanasundaram* v. *Muthuveera*[1], observed :

> " In the vocabulary of the draftsman " deemed " is a term of art, which expresses an intention to create and keep in being, by a legal fiction, that which in the ordinary course of law did not or would not exist ".

But that is by no means the entire difficulty. When such a legal fiction has to be given effect to, difficulties may arise in determining the extent to which the fiction ought to be operative. A very helpful enunciation of the true principle will be found in Ex parte *Walton* In re *Levy*[2]. James , L.J., laid down:

> " When a statute enacts that something should be deemed to have been done, which in fact and truth was not done, the Court is entitled to and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to ".

An important instance of the application of a legal fiction is *East End Dwellings Co., Ltd.* v. *Finsbury Borough Council*[3]. That was a case in which, under a certain rule, a certain valuation of property was directed to be regarded as that,which it would have been, if the entire damage had been made good before a certain date of notice. Lord Asquith observed in a passage, which has become oft-quoted in the interpretation of statutory fictions :

> "If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs ; it does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs ".

In *Income-tax Commissioner, Delhi* v. *S. Teja Singh*[4], their Lordships were concerned with a legal fiction under section 18-A (9) (*b*) of the Income-tax Act, that the failure to send an estimate under section 18-A (3) was to be deemed to be a failure to send a return. Venkatarama Iyer, J., observed :

> " It is a rule of interpretation well-settled that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate ".

The observations of Lord Asquith in *East End Dwellings Co., Ltd.* v. *Finsbury Borough Council*[3], set forth above, have been fully extracted and followed in the case.

We may thus arrive at two determining principles, in dealing with a statutory fiction as applying to certain facts. Firstly, the Court is entitled to and bound to ascertain, for what purposes the fiction was enacted, between what persons it should be operative, and how it should be given effect to. Secondly, in giving effect to a legal fiction, the corollaries of the assumed identity cannot be shirked; it is not merely proper, but even necessary, to assume the other facts also upon which the fiction can operate.

Applying these principles, we are very clear that the rents paid towards the lease by the mortgagor should be deemed to be the interest, and that section 8 or 9 read with section 12 or 13 as the case may be, should be applied to scale down the entire debt. Such rents are obviously quite distinct from the interest paid by a debtor to a creditor, but the statutory fiction assumes the identity where it does not exist. But, by the very virtue of the principles that we have set forth above, we do not think that *Explanation I* to section 8 in particular can apply to the facts. *Explanation I* lays down that every payment made by a debtor should be credited towards the principal, unless the debtor had expressed his intention that the payment should be in reduction of interest. In other words, with reference to the law of appropriation, the rule proceeds on the footing that where there is a liberty on the part of the debtor to make a specific appropriation, namely, towards interest, and he does not make that

1. (1959) 72 L.W. 1, 6.
2. (1881) L.R. 17 Ch. D. 746.
3. L.R. (1952) A.C. 109 (H.L.).
4. (1959) 1 M.L.J. (S.C.) 154: (1959) 1 An. W.R. (S.C.) 154 : (1959) S.C.J. 425 : A.I.R. 1959 S.C. 352.

appropriation expressly and in writing, the payments shall be considered as open payments, and shall be credited towards the principal. This cannot be the consequence of the legal fiction enacted in section 9-A, sub-section (9) (*a*) (i), for the simple reason that it does not flow either from that legal fiction, or from its inevitable corollaries. We may assume that rents or lease amounts paid constituted interest, and we may apply the provisions of section 8 or 9 read with section 12 or 13, as the case may be, to the facts. But we cannot construct further legal fictions, which will have to be constructed, before *Explanation I* to section 8 can be made applicable. We cannot assume that the consciousness with which these rents were paid by the mortgagor, shall be deemed to be the consciousness with which a debtor repays moneys, and that the jural relationship of lessee and lessor shall further be deemed to have been substituted by the different relationship of debtor and creditor and that in a context in which the debtor had the right to make specific appropriations towards interest, expressly and in writing, he failed to do so. These are not merely the inevitable corollaries of the first and only legal fiction that the Legislature has actually enacted. For *Explanation I* to section 8 to apply, other and distinct legal fictions have to be brought into play, including the legal fiction of a totally different consciousness and a right of appropriation, which the party making these payments could not have possessed. We are of the view that the observtions of Lord Asquith in *East End Dwellings Co., Ltd.* v. *Finsbury Borough Council*[1] and of the Supreme Court in *Income-tax Commissioner, Delhi* v. *S. Teja Singh*[2], only amount to this, that for purposes of giving effect to the legal fiction, we should assume the existence of factors upon which the fiction could operate. But we cannot create further legal fictions, which have not been enacted, in order to make applicable a certain state of rights, which does not flow or follow from the assumption of identity *per se* which the Legislature has actually enacted. In this view, we conclude that, though the debt is liable to be scaled down, assuming that these payments towards rent are to be regarded as payments towards interest, *Explanation I* to section 8 in particular cannot apply, because it has not been enacted that the person making the payments must also be deemed to have considered himself as a debtor repaying a creditor, and deemed to have exercised a right of appropriating those payments in a particular manner, either by actually appropriating them towards interest in writing, or failing to do so.

Upon the third ground, we do agree that credit must also be given for certain amounts paid by the lessee under the security bond, apparently equivalent to the *kists* payable on the properties. Since it was the mortgagee who had to pay *kists* under the document of hypothecation the lessee is entitled to credit for these amounts, and also to have the rule of *damdupat* applied to the facts. Applying that rule, we find that the properly ascertained liability is Rs. 6,320-11-4. Accordingly the Appeal No. 277 is partly allowed to this extent, and the parties will bear their own costs.

P.R.N. *C.M.A. No.* 263 *of* 1956 *dismissed.*
*C.M.A. No.*277 *of* 1956 *allowed in part.*

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1. L.R. (1952) A.C. 109 (H.L.).
2. (1959) 1 M.L.J. (S.C.) 154: (1959) 1 An. W.R. (S.C.) 154: (1959) S.C.J. 425: A.I.R. 1959 S.C. 352.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Sri Ramanasramam by its Secretary G. Sambasiva Rao and others .. *Appellants**

v.

The Commissioner for Hindu Religious and Charitable Endowments, Madras .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 6 (17)—*Temple—Essentials—Mathrubutheswarar shrine adjunct to the Ramanasramam—Not a temple within the purview of the Act.*

Madras Act XIX of 1951 is intended to apply only to religious institutions and endowments which are exclusively Hindu in character.

The connotation of a temple as defined in the Act consists of the following two component parts, *viz.*, it must be an exclusively Hindu institution and it must be exclusively a place of Hindu public religious worship.

A temple must conform to Agama Sastras or by immemorial public usage must have come to be regarded as a place of public religious worship notwithstanding its non-conformance with the Agama Sastras.

The Samadhi described as Mathrubootheswarar temple is an adjunct to the Ramanasramam and is certainly not the core around which the Asramam grew. This institution is a composite institution and in accordance with the founder's universal outlook is open to devotees of all religions. It stands to commonsense also that no exclusively Hindu shrine would be an appenage of a cosmopolitan Ashram and where persons of other religions were consistently paying homage at the shrine.

The building of a samadhi or tomb over the remains of a person and the making of the provision for the performance of Gurupooja and other ceremonies in connection with the same is not recognized as charitable or religious purposes according to Hindu Law.

It has become settled law that a Samadhi by itself and not treated as a fitting object of public Hindu religious worship for over a long period does not evolve into a temple.

Sri Mathrubootheswarar shrine is not a temple within the meaning of the Act and is only an adjunct to Sri Ramanasramam, a public religious trust.

Case-law discussed.

Appeal against the Decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 69 of 1954.

T. M. Krishnaswami Ayyar and *M. Natesan*, for Appellants.

The Government Pleader (*K. Veeraswami*) for Respondents.

The Court delivered the following Judgments:

Ramaswami, J.—This appeal is directed against the Decree and Judgment of the learned Subordinate Judge of Vellore, in O.S. No. 69 of 1954.

It is a statutory suit filed under section 62 of the Madras Hindu Religious and Charitable Endowments Act (hereinafter referred to as the Act) by the persons aggrieved who consist of Sri Ramanasramam by its Secretary G. Sambasiva Rao, T. N. Venkaraman, A.W. Chadwick, S. S. Cohen, Framji Dorabji, A. Devaraja Mudaliar and C. Somasundaram Pillai. The defendant is the Commissioner for Hindu Religious and Charitable Endowments, Madras. The question for consideration is whether the component part of Sri Ramanasramam, by name Sri Mathrubootheswara Swami Temple, an institution registered under the Societies Registration Act, (Exhibit A-23, dated 11th September, 1950), is a temple as contemplated by section 6 (17) of the Act, as has been held by the learned Subordinate Judge or a public religious trust as has been contended by the plaintiffs, with the following objects *viz.*, to carry out the provisions in the Will of Sri Bhagwan, to administer Sri Ramanasramam, Sri Mathrubootheswara Swami temple, the Samadhi of Sri Bhagwan Ramana Maharishi with the properties and assets attached thereto and for propagating the sayings of the Bhagwan.

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*Appeal No. 522 of 1956. 12th December, 1959. (21st Agrahazgna 1881-Saka.

Section 6 (17) of the Act defines a temple as,

"a place, by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of or use as of right by, the Hindu Community or any section thereof, as a place of public religious worship."

In regard to what constitutes a public religious trust in Hindu Law, we have three authoritative works of Pandit Pran Nath Saraswati's Hindu Law of Endowments, Tagore Law Lectures, (1892), P.R. Ganapathi Ayyar's Hindu and Mohammadan Endowments, Second Edition (1918) and B. K. Mukherjea's (late Chief Justice of India) Hindu Law of Religious and Charitable Trust, Tagore Law Lectures (1952) and the following information can be gathered therefrom.

In the Hindu system there is no line of demarcation between religion and charity. On the other hand, charity is regarded as part of religion. This is because the Hindu Religion recognises the existence of a life after death, and it believes in the Law of Karma according to which the good or bad deeds of a man produce corresponding results in the life to come. Therefore, all the Hindu sages concur in holding that charitable gifts are pious acts *par excellence* which bring appropriate rewards to the donor.

Hindu religious and charitable acts have been from the earliest time classified under two heads, viz., *istha* and *purtta*. The two words are often used conjointly and they are as old as the Rig Veda. The compound word *istha-purtta* has been retained in the writings of all Brahminical sages and commentators down to modern days, and although the connotation of these two expressions was extended to some extent in course of time, the fundamental ideas involved in them remain practically the same. By *istha* is meant Vedic sacrifices, and rites and gifts in connection with the same ; *purtta* on the other hand means and signifies other pious and charitable acts which are unconnected with any *srauta* or Vedic sacrifice. The meaning of those two expressions has been discussed elaborately by Pandit Pran Nath Saraswati, in his Tagore Law Lectures on the Hindu Law of Endowments.

Following a text of Sankha quoted by Hemadri, Pandit Pran Nath Saraswati, makes the following enumeration of *istha* works, *viz.*,(1) Vedic sacrifices, etc., (2) gifts offered to priests at the same, (3) preserving the Vedas, (4) Religious austerity, (5) Rectitude, (6) Vaiswadev sacrifices and (7) hospitality. The *purtta* works not only signified such works of public utility as excavation of tank, wells, etc., but included all acts which either conferred some kind of benefit on those who were in need of it, or were regarded as meritorious from the spiritual or religious point of view. From the numerous Smriti texts bearing on the point, Pandit Pran Nath Saraswati has compiled a list of *purtta* works which are generally recognised as such by Brahminical writers. These are: (1) gifts offered outside the sacrificial ground,(2) gifts on the occasion of an eclipse, solstice and other special occasions, (3) the construction of works for the storage of water, as wells, tanks, etc., (4) the construction of temples for the Gods, (5) the establishment of procession for the honour of the Gods, (6) the gift of food and (7) the relief of the sick. This list is by no means exhaustive. One other form of religious and charitable endowment which is popular with the Hindus is to create places where hospitality can be combined with dissimination of religious knowledge and facilities for meditation.

Charitable trusts are of two kinds—public and private. The Hindu Law itself knows no distinction between public and private religious or charitable trusts : *Rupa* v. *Krshnaji*[1]. Hence it was that West, J., remarked in general terms in *Manohar* v. *Laxmiram*[2], that a trust for a Hindu idol and temple is to be regarded in India as one created for public charitable purposes within the meaning of section 539 of the Code of Civil Procedure, 1882, corresponding to section 92 of the present Code. Still that distinction is not without its meaning in Hindu Law as now administered. It is therefore necessary to show here where the distinction lies. In English law the terms "public" and "private" are thus defined :—By "public" must be under-

1. (1884) I.L.R. 9 Bom. 169.
2. (1887) I.L.R. 12 Bom. 247.

stood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. The essential elements of a public charity are that it is not confined to privileged individuals but it is open to the indefinite public, or some portion thereof or upon an indefinite class of persons. It is this unrestricted quality that gives it its public character: (Ten *American Jurisprudence*, 588). The line of distinction between purposes of a public nature and of a private nature is fine and practically incapable of definition; (IV Halsbury, third Edition, page 211). See also *Ram Saroop* v. *Sahi*[1], a case under Bihar Hindu Religious Trusts Act and also *Moti Das* v. *Sahi*[2]. To this class of "public trust" belong all trusts for charitable purposes and indeed *public* trusts and *charitable* trusts may be considered in general as synonymous expressions. In *private* trusts the beneficial interest is vested absolutely, in one or more individuals who are or within a certain time may be, definitely ascertained and to whom therefore collectively, unless under some legal disability, it is, or within the allowed time will be, competent to control, modify, or determine the trust. A public or charitable trust on the other hand has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement upon a private trust (Lewin on Trusts, page 18): The same distinction has been expresed in a simpler language by Mr. G. S. Shastri in his Hindu Law at page 491. He says that when property is dedicated to charitable, education or religious uses for the benefit of an indeterminate body of persons, the endowment is a public one and when property is set apart for the worship of a deity of a particular family in which no outsider is interested, the endowment is a private one. It seems that it was with this distinction in view that the Privy Council held in a Calcutta case that in the case of a family idol the concensus of the whole fami might give the estate another direction: *Kunwar Durga* v. *Ram*[3]. This decision appears to have been followed in another case which went up to that High Court and approved in a somewhat analogous case by the Bombay High Court; *Govind* v. *Debendra*[4] *Kettur Chander* v. *Haridas*[5], *Rajaram* v. *Ganesh*[6]. These decisions are obviously based on the belief that the endowment in each case was a private one. Mr. Shastri has in view of the decisions gone so far as to assert that if all the members of the family to which an endowment belongs renounce Hinduism and choose to throw the family idol into the water of the Ganges and themselves enjoy its property, no outsider can raise any objection to that course; (Shastri's Hindu Law, page 491). The Allahabad High Court had on the other hand occasion to define what a public endowment was in the case of *Mahant Puram Atal* v. *Darshandas*[7]. Therein Chamiar, J., remarked:

> "It seems beyond doubt that in order that a trust may be a trust for a public purpose it is not necessary that it should be a trust for the benefit of the public at large. It is sufficient to show that it is a trust for the benefit of a section of the public".

It seems it was with some such definition of a *public trust* in view that, where a Hindu provided for the creation and maintenance of a religious endowment in favour of the sect known as the Bhagawatas, appointing managers and directing the manner in which the profits of the endowed properties were to be spent, the Calcutta High Court held that there was a public religious endowment within the meaning of section 539 of the Civil Procedure Code, 1882: *Kanaialal* v. *Shaligram*[8].

In regard to abuses relating to public and private trusts and the powers of the civil Court to give reliefs like the framing of schemes of management, etc., in the case of public trusts, the powers are regulated by section 92 of the Code of Civil Procedure and in the case of private trusts, by a long series of decisions. It is enough

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1. (1959) S.C.J. 1173 : A.I.R. 1959 S.C. 951.
2. (1959) S.C.J. 1144: A.I.R. 1959 S.C. 942.
3. (1876) L.R. 4 I.A. 52 : I.L.R. 2 Cal. 341 P.C.
4. 12 C.W.N. 98.
5. I.L.R. 17 Cal. 557.
6. (1898) I.L R. 23 Bom. 131.
7. (1912) I.L.R. 34 All. 468.
8. (1894) A.W.N. 159.

to refer here to the following decisions: In *Narayanaswami Naidu* v. *Balasundaram Naidu*[1], it was held that:

" even in the case of private trusts, it is open to any member of the founder's family where his rights are impugned to seek redress in Courts of law... . The Court cannot refuse to frame a scheme in the matter of a private trust. So far as the members of the family are concerned who are interested in the trust, if the trustee for the time being mismanages or acts in breach of trust, it is a civil right which is infringed and under section 92, Civil Procedure Code, they are entitled to seek redress in Court for the purpose of remedying the mischief."

In *Chellam Pillai* v. *Chathan Pillai*[2], it has been held that:

" though section 92, Civil Procedure Code in terms does not apply because it relates specifically and definitely to the case of public trusts, in the case of a private family trust the Court has got jurisdiction to frame a scheme for the management of the trust ".

In *Vaithinatha Aiyar* v. *S. Thyagaraja Aiyer*[3], two plaintiffs instituted the suit under section 92, Civil Procedure Code, as the descendants of the founder of the charity, a chatram. On the question of their right to institute the suit, it was held that:

" the fact that the plaintiffs belong to the family of the founder would naturally give them an interest in the family charity so as to enable them to bring a suit under section 92 of the Civil Procedure Code ".

In addition, the powers of the civil Court in the case of private trusts to frame a scheme have been affirmed in a Bench decision of this Court in A.S. No. 221 of 1951, to which one of us was a party.

Bearing these principles in mind, let us examine the facts of this case and find out whether the institution under consideration is a temple within the meaning of section 6 (17) of the Act, or is a public religious trust as contended for by the appellants before us.

In order to find out whether this institution falls within the scope of the Act, we must first of all determine the connotation of a temple which consists of the following component parts, *viz.*, firstly that it must be an exclusively Hindu institution and secondly, that it must be exclusively a place of Hindu public religious worship.

In regard to the first point, in *The Uramu Seshachalam Chettiar Charities, Tiruchirapalli by its Board of Trustees* v. *The State of Madras and others*[4], Balakrishna Ayyar, J., has construed the Long title and Preamble to the Act which run as follows:

" An Act to provide for the better administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Madras. Whereas it is expedient to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Madras; it is hereby enacted as follows."

The learned Judge observed:

" I would draw attention to the words ' Hindu Religious and Charitable Institutions and Endowments " occurring in both the Long title and the Preamble. The Act is intended to apply to (1) Hindu *religious* institutions and endowments, and (2) Hindu *charitable* institutions and endowments. It seems to me to be manifest that the word ' Hindu ' is not used in one sense in relation to *religious* institutions and endowments and in another sense in relation to *charitable* institutions and endowments. The word '*Hindu*' must be given the same connotation whether it is read in connection with religious institutions and endowments or whether it is read in connection with charitable institutions and endowments. Now, we can have a Hindu relig ous institution or a Christian religious institution or a Muslim religious institution. But, I do not see how we can have a religious institution which is at one and the same time partly Hindu and partly Christian or partly Muslim. I am not aware that any religious institution exists in the State which bears such a composite character. There can be no doubt whatever that so far as religious institutions are concerned, the Act is intended to apply only to religious institutions and endowments which are exclusively Hindu in character. The omission of the word 'exclusively' on which Mr. Srinivasan laid stress, is of no consequence. In fact, the introduction of such a qualifying word was entirely unnecessary and would only have led to confusion and controversy in other places in the Act. The expression 'Hindu Temple' is plain enough. By saying 'exclusively Hindu temple' we are not making the meaning plainer; we are only introducing degree of annoyance.

1. (1952) 1 M.L.J. 487.
2. A.I.R. 1953 Trav.-Coch. 198.
3. (1922) 41 M.L.J. 20.
4. W.P. No. 1034 of 1957.

" . . . . section 9 of the Act enjoins that the Commissioner, every Deputy Commissioner, every Assistant Commissioner and every other officer or servant appointed to carry out the purposes of the Act, by whomsoever appointed, shall be a Hindu. The section also enacts that should a person so appointed cease to be a Hindu he shall also cease to hold office. Likewise, section 22 requires that no person shall be appointed to be a trustee of a religious institution . . . . . unless he is a Hindu. Provisions of this kind would be appropriate only in respect of institutions which are exclusively Hindu. The Legislature could hardly have intended that provisions of this kind should apply to what may be called mixed or composite institutions, that is to say, institutions which are only partly Hindu and partly non-Hindu. That would amount to discrimination based on religion. It would also probably be correct to say . . . . that the Act would apply to institutions which are exclusively Hindu in character."

The evidence in the instant case shows that this institution is a composite institution and it is only in accordance with Sri Ramana Maharishi's universal outlook making his Asramam open to devotees of all religions : *vide* B-16, pages 94 and 284 ; Exhibit A-29, page 201 and Exhibit A-30, page 13. The contributions came also largely from non-Hindus : *see* Exhibits A-38 to A-47 and the account books of the Asramam (Exhibits A-17 and A-14). It stands to commonsense also that no exclusively Hindu shrine would be an appendage of a cosmopolitan Asramam, and which would have been totally inconsistent with Sri Ramana Maharishi's teachings and life. This is not the place for further dealing with the life and teachings of Sri Ramana Maharishi, which would amply bear out this conclusion, because they are not in dispute ; it would be enough to refer here to a valuable publication of the life and teachings of Sri Ramana Maharishi by the late Sri B. V. Narasimhaswami, a distinguished lawyer and legislator of this State, of which the 5th Edition has been revised by Mr. S. S. Cohen, one of the appellants before us.

The oral evidence has established beyond doubt that persons of other religions were consistently paying homage at the shrine : *see* Exhibit A-50 and the deposition of Dr. Syed. In other words, the evidence in this case clearly shows that the first requirement, *viz.*, that it must be a place exclusively dedicated to the Hindus and is an exclusively religious place, does not stand made out.

Then we have to define the religious worship of Hindus. The term religion whatever its best definition, clearly refers to certain characteristic types of data (beliefs, practice, feelings, moods, attitudes, etc.). It primarily involves some immediate consciousness of transcendent realities of supreme personal worth vitally influencing life and thought, expressing themselves in forms which are conditioned by the entire stage of development reached by the individual and his invironments and tending to become more explicit and static in mythologies, theologies, philosophies and scientific doctrines.

The lexicographers' definition of *religion* can be gathered from the *Shorter Oxford English Dictionary, Funk & Wagnll's New Dictinary of the English Language, Webster's International Dictionary of the English language, Murray's New English Dictionary and Earl Jowitt's* (Former Lord Chanceller of England) *Law Dictionary* (1959).

(i) Action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power : the exercise or practice of rites or observances implying this.

(ii) Some system of faith and practice, resting on the idea of the existence of one God, the creator and Ruler, to whom his creatures owe obedience and love.

As to conditions as to religion, see *Re Allen*[1], *Re Wolfe*,[2], *Re Allen* (*No.* 2)[3].

(iii) A belief in an invisible superhuman power (or powers) conceived of after the analogy of the human spirit, on which (or when) man regards himself as dependant, and to which (or whom) he thinks himself in some degree responsible together with the feelings and practices which naturally flow from such a belief.

(iv) The outward act or form by which men indicate their recognition of the existence of a God or of Gods having power over their destiny, to whom obedience,

1. L.R. (1953) Ch. 810.
2. (1953) 1 W.L.R. 1211.
3. L.R. (1954) Ch. 259.

service, and honour are due; the feeling or expression of human love, fear or awe of some superhuman and overruling power, whether by profession of belief, by observance of rites and ceremonies, or by the conduct of life; a system of faith and worship; a manifestation of piety as, ethical religions, monotheistic religions, natural religion, revealed religion, the religion of idol worshippers. Religion (as distinguished from theology) is subjective, designating the feelings and acts of men which relate to God. As distinguished from morality, religion denotes the influences and motives to human duty which are found in the character and will of God, while morality described the duties to man, to which true religion always influences.

Religions, by which are meant the modes of divine worship proper to different tribes, nations, or communities, and based on the belief held in common by the members of them severally. There is no living religion without something like doctrine.

What is worship? The word itself is English and almost untranslatable into other languages. Originally it implied acts prompted by veneration, but with stress of time and weight of usage, it has come to be applied to the whole range of religious behaviour, so that one might well say that worship is the active side of religion. (Hastings Encyclopaedia of Religion and Ethics, Vol. 12, page 752 and foll.)

The lexicographers definition of worship can be gathered from *Ballentine Law Dictionary, Websters International Dictionary of the English Language, Murray New English Dictionary, Funk and Wagnalls New Dictionary of the English Language, Shorter Oxford English Dictionary* as follows: Worship is the act of paying honour to the Supreme Being; religious reverence and homage, adoration paid to God or a Being viewed as God with appropriate acts, rites or ceremonies See *Hansher* v. *Hansher*[1].

So far as the Hindus are concerned, worship includes the place of worship, and forms in which this active behaviour and venerations should be expressed and those are all regulated by Agama Sastras. In *Saraswathi* v. *Rajagopal Ammal*[2], it has been held by the Supreme Court that in the case of Hindus the institution must be shown to have a Shastraic basis. This Shastraic basis is not only provided for by the Agama Sastras, but it has also got an equivalent when particular practices have obtained recognition as constituting long religious practices and usage of a substantially large class of persons. Thus in South India several places of public worship not governed by the Agama Sastras have grown up, on account of the superimposition of the Aryan culture over the Dravidian native culture. (*See* Kanakasabhai Pillai's Tamil Eighteen Hundred Years Ago (Reprint by the South India Saiva Siddhanta Works, Tirunelveli), Chapter xv, page 226 and foll). One illustration may be given. In *The Board of Commissioners for the Hindu Religious Endowments, Madras* v. *Pidugu Narasimham and others*[3], the curious temple consisted of the images of as many as 66 heroes who were said to have been killed in a war between two neighbouring kingdoms in the 13th century and they were systematically worshipped. Similarly, cave temples, and the vilage deities like Poleri Amman, Mariammam, Ellai Amman, etc., which have no roof over their heads may not conform to the Agama Sastras. But on account of the long worship by the Hindu public they have in course of time come to be classed as temples. In other words, a temple must confirm to Agama Sastras or by immemorial public usage must have come to be regarded as places of public religious worship notwithstanding its non-conformance with the Agama Sastras. It it as against this background we have got to examine whether the Mathruboothe-swarar temple in the Ramansramam is Samadhi only or has evolved into a public temple. In *Elumalai Chetty* v. *Commissioner, H. R. & C. E., Madras*[4], one of us has set out the origin and development of temples in Southern India. In India during the Vedic period there were no temples on account of the domestic character of Vedic worship (Saraswati, Tagore Law Lectures, page 34). No traces of temples built in the pre-Buddhist period is known. But the Ramayana and Mahabharata mentioned

1. 132 : Illinois 273 : 8 L.R.A. 556 (U.S.A.).
2. (1953) 2 M.L.J. 803 : (1953) S.C.J. 714 : 1954 S.C.R. 277 (S.C.).
3. (1939) 1 M.L.J. 134.
4. 68 L.W. 260 (2).

Chaityas in several places. Originally Chaitya seems to have been a tree planted on the grave. Tree planted on the Chiti became Chaitya. Later shrines probably of wood were erected. It is even possible that they had upper storeys. For the Ramayana in one place (Book 1) compares the upper parts of the places in Ayodhya to the *Vimanas* of the *Siddhas*, a species of Gods. Although the Arthasastra of of Kautilya does not describe anywhere a temple, it mentions *Chaityas* and gives in Book 2, 3 description of the temple of *Kumari*, the goddess of war. Kautilya agrees with Megasthanes that the temples were under the control of Government and there was a special department to govern religious institutions and its head was known as the Superintendent of Religious Institutions. Religious edifices are certainly known for the first time in Buddhism. Hindu temples doubtless owe much in their inception to Buddhism and proliferated into a great variety in structure, size and ornamentation. Temple buildings reached fresh heights in the Gupta period. The Agama Sastras naturally came into existence to formalise and regularise temples and worship in temples.

So far as Southern India is concerned, in course of time by the 7th centuary A.D. substantial temples in stones came to be constructed. The earliest well-known Hindu temples in South India are those of Mahabalipuram in the Chingleput District. The inscriptions show that they were hewn out of the living rock by the Pallavas in the 7th century A.D. There has subsequently been a ceaseless building of temples by the warrior Kings and noblemen and men and women of piety of all castes. It is enough to mention here that one type of shrines was built at graves. The connection with the graves is seen not only in the case of the temples of the village deities but in that of temples of certain Gods like *Sivasmasaneswara*. Shrines over and near the burial grounds called Palli-padai are recorded in the inscription of the 9th century A.D. at Solapuram in North Arcot District recording that theChola King Rasaditya caused a Siva temple to be built on the spot where his father had been buried. Similar inscriptioms relate to Tondamanad in Chittoor District and Choleswara temple in Melpadi. We have already referred to the shrine of the 66 heroes who fell in battle. In the South Arcot District there are shrines in existence called Veerakkals commemorating the fallen village heroes grappling with marauding tigers. Over the tombs of Saints shrines have also been built and gurupoojas performed. It is quite true that notwithstanding the non-conformity with the Agama Sastras, by reason of long public worship they have become temples. But it has now become settled law so far as this State is concerned that a Samadhi by itself and not treated as a fitting object of public Hindu religious worship for over a long period does not evolve into a temple. Otherwise all of us can deify ourselves. In *Ratnavelu Mudaliar* v. *Commissioner for H. R. & C. E.*[1], a Bench of this Court had to consider whether an institution known as Apparswami Pagoda situate in Mylapore, is a temple. It is reputed to be the samadhi or tomb of one Apparswami. It attracted a concourse of worshippers and the building has got all the normal features of a temple in that it has got a Prakaram, Dhwajasthambam, Bali-peetam and Nandi-keswara, and there are shrines for Bhairavar, Kasi Visalakshi, Chandikeswarar and other deities. It has a 16 pillar Mantapam and there are Gopurams all over the shrines. Festivals are being performed and the deity is taken in procession and Archanas are performed by the worshippers. The Bench held that on account of the fact that this institution for over a century at least had been regarded as a place of religious worship by the public entitled thereof as a matter of right, though the institution had its reputed origin in a Samadhi and continued to retain traces of its origin and Gurupooja was performed in the precincts, the institution would be a temple. Reference was made in the judgment to the decision of Viswanatha Sastri, J., in *Ramaswami* v. *The Board of Commissioners, Madras, H.R.E.*[2], where on account of the long public religious worship what were originally memorials for heroes or martyrs had subsequently developed into temples and came to be recognised as temples. In *Bodendraswami Mutt* v. *President, H.R.E. Board*[3], it was held that a Samadhi of a

1. (1953) 2 M.L.J. 574.
2. (1950) 2 M.L.J. 511.
3. (1955) 2 M.L.J. 60.

holy man and a saint cannot ordinarily evolve into a temple for public religious worship and that the mere presence of idols of Gods and recognised deities in the Matam round the Samadhi and the festivals which have grown up round such Samadhi inevitable in the case of all tombs of saints and great men in this country, would not bring it within the definition of a temple and that a Samadhi is not a temple. We have already referred to the Supreme Court decision in *Saraswathi* v. *Rajagopal Ammal*[1], in which it was held that dedication of property for worship at a tomb is not sanctioned by Shatraic practices and is not valid among Hindus. A number of decisions of this Court were referred to with approval viz., *Kunhamutty* v. *Thondikkodan Ahmad Miasallar and two others*[2]. *A. Draiviasundaram Pillai* v. *Subramania Pillai*[3], *Veluswami Goundan* v. *Dandapani*[4], for the position that the building of a Samadhi or tomb over the remains of a person and the making of the provision for the performance of Gurupooja and other ceremonies in connection with the same, cannot be recognised as charitable or religious purposes according to Hindu Law.

That the institution in question called Mathrubootheswaraswami is only a Samadhi and not a temple is established by the facts of this case. It is admitteldy the Samadhi of a Hindu Brahmin widow, *viz.*, the mother of Sri Ramana Maharishi. It is elementary that a South Indian Hindu Brahmin widow is not entitled to Sanyasam. If support is required, *see* Exhibit A-28 and the deposition of P.W. 6. If that lady who was the Baktha of her own son was not entitled to Sanyasam, she is certainly not entitled to Samadhi, since our Hindu Sastras require that she should be cremated. In fact the classic instance of the mother of the great *Adi Sankaracharya* can be remembered. That lady was a widow when her son wanted to become at a very early age a Sanyasi and she would not give her consent which was necessary before a Brahmin can become a Sanyasi repudiating his obligations. It is said that one day while bathing a crocodile caught hold of the young Sankaracharya and his mother when she begged piteously from the shores of the river for the freeing of her son, she was told by him that the crocodile would free him only if she allowed him to become a Bala Sanyasi. The mother agreed on one condition, *viz.*, that on her death her son should perform her last obsequies and cremate her and not leave her to the tender mercies of the hostile Nambudri reversioners. It is said that Sri Sankaracharya when the moment of his mother's death came to be known to him by his foresight, he managed to be at the spot and the cremation of the mother was done by him which normally he could not having renounced the world but for the promise made to his mother. So, even Sri Ramana Maharishi could not confer Sanyasam on his deceased mother-in fact it must be said that he never thought of it even. Such a Samadhi cannot be consecrated and Prana Prathishta done, which is essential for the installation of the idol. Otherwise, the Lingam would be a mere piece of stone and nothing else. It is only Prana Prathishta which makes it a living God, a juristic entity, entitling it to be an object of gift. Then there is another provision in the will for the installation of a statue or image or symbol of Sri Ramana Maharishi himself and certainly it would be idle to centend that this would evolve into a public temple. It is also seen that along with this Brahmin widow laid to rest, a cow by name Lakshmi a dog and a monkey also lie buried there. From the point of view of the Maharishi, who saw Divinity in every thing, this is not a bizarre, but certainly it would be outrageous to say that the burial place of the bipeds and quadrupeds would evolve into a public temple. In fact so far as Hindus are concerned, entering *Rudra Bhoomi* causes pollution and has to be expiated by a bath and it need not be pointed out also that a burial place for cows, dogs and monkeys would certainly be considered by Hindus as being sacrilegious adjunct to the temple. In fact even if deaths are to occur incidentally inside the premises there can be no worship until *Samprokshanam* is performed. Then only worship will be resumed.

In the circumstances of this case it cannot also be said that there has been a dedication exclusively to the Hindu public or a section thereof. In fact contrary to

1. (1953) 2 M.L.J. 803 : (1953) S.C.J. 714 : 1954 S.C.R. 277 (S.C.).
2. (1935) 68 M.L.J. 107.
3. (1945) 2 M.L.J. 328.
4. (1946) 1 M.L.J. 354.

the notions of Hindus, Sri Ramana Maharishi, who was above all rules and restrictions and practices governing the lives of Hindus in the matter of religious worship, considered that the death of his mother did not cause any pollution. Similarly, the Bhagwan, universal in his outlook, threw open his Asramam to devotees of all religions. This Asramam itself, as mentioned before, has been built by contributions given largely by non-Hindus. The oral evidence shows that persons of other religions came to pay homage at the shrine. It stands to common sense that there would not have been an exclusively Hindu shrine in the cosmopolitan Asramam, inconsistent with Sri Ramana Maharishi's teachings and life. So, if there was a dedication, that dedication must have been to persons of all castes and creeds and not to the Hindus only or to any definite section thereof only. In fact Exhibit A-12, the site plan of the Asramam, shows that the frontage is Sri Ramana's hall. This place was the magnet that attracted all the persons seeking self-realization. It was in search of Bhagwan and the solace of peace that his presence gave, that the devotees belonging to all castes and creeds came from all over the world. It is significant that for the celebrations within the Asramam invitations were not sent to all and sundry. But a list of invitees was kept, who were the devotees of the Asramam. This is borne out by Exhibit A-4, the deposition of Sri Ramana Maharishi (Exhibit A-18), the deposition of Sri K. Sundaram Chettiar (Exhibit A-37), Exhibit B-16 (pages 1 and 284), Exhibit A-29 (page 152) and Exhibit A-32 (pages 28 and 29), and the admission of Mouni, the contestant in the proceedings, and the other witnesses in the earlier case.

To sum up, the Samadhi described as Mathrubootheswara Swami is an adjunct to the Asramam and is certainly not the core around which the Asramam grew.

This can be tested from another angle also. The properties have been acquired only personally by Sri Ramana Maharishi according to whom, himself and his institution "Ramanasramam" are one entity; vide Exhibit A-1, A-3 and A-6, documents relating to the acquisition of property and also the admission of D.W. 4. The Asramam accounts show that the moneys were brought into the Bhagwan's accounts and then disbursed. Exhibit A-4 recognises that the Bhagwan held properties as his own. The Bhagwan's will Exhibit A-5 came into effect on his Siddhi. Nothing transpired on his Siddhi or thereafter to convert these private properties into public properties excepting by being registered under the Secieties Registration Act.

In fact what has really happened is absolutely clear. The origin of the shrine is a matter of yesterday's history. In this case we are fortunately in possession of information showing the circumstances under which the Samadhi came into existence and the other appanages were built around it from the Bhagwan's own mouth as well as of persons present at the foundation and construction. The remains of Sri Ramana Maharishi's mother instead of being cremated were, by the devotees of Sri Ramana Maharishi, his brother and others, buried in a grave and a structure has been erected thereon and a Lingam, which was made available, was installed thereon. This is in accordance with the practice of honouring the dead prevalent among several sections of the people in Southern India and to which a more detailed reference will be made when we come to deal with the learned Government Pleader's arguments. As pious and charitable people contributed funds for the glorification of this Samadhi, more and more appanages were built around. This Samadhi however continues to be a part of the various other places which have been erected within the Asramam compound and the frontage of the shrines, as mentioned before, is the hall of the Bhagwan with a dais for him to sit upon. Naturally, legends have grown up regarding what happened to the mother and her demise. These theological and philosophical aspects of what happened after the mother died, do not constitute any solid basis for discussion especially in view of Sri Ramana Maharishi's own deposition Exhibit A-18 where there is no reference to any apotheosis of his mother. In Southern India it is the commonest thing that in announcing the death of elderly persons, it is generally stated that he or she has reached Sivapatham, or attained mukthi or had become one with the Divine. In fact all the Brahmin

ceremonies beginning from the tenth day and ending with the annual Shrardha are all directed towards the soul merging in the Divine. But stripped of all these embellishments, the body of the deceased practically illiterate Brahmin widow whose only claim to fame was devoted service to her aliastramatic son was nothing more than a simple corpse buried there and in fact the Pooja is stated to be only for the Annai or mother. All the Ashramam publications inclusive of the Kumbabisheka Patrika, emphasise that the so-called temple enshrines the remains of the mother only.

In this connection we may refer to the following publications :

Exhibit B-16 (1944) Edition *Self-realization*; Exhibit A-29 (1931 Edition) *Self-realizations* ; Exhibit B-2 *Kumbabisheka Patrika* ; Exhibit A-51 *Sri Ramana Maharishi* ; Exhibit B-14 (1951) *Tamil History of Sri Rmanasramam*; Exhibit A-49 (1939) *Sri Maharishi* ; Exhibit A-52 (1947) *Sri Ramana Maharishi* ; and Exhibit B-15 (1951) *Book on Sri Maharishi*, in English. We may also refer to the oral evidence of persons present *viz*., P.W. 4, Raju Sastri (whose deposition before the Deputy Commissioner is marked as Exhibit A-28) and Sri Ramana Maharishi himself (Exhibit A-18).

The learned Government pleader wants to get over this fact that the *sanctum sanctorum* enshrines only the mortal remains of Sri Ramana Maharishi's mother and constitutes nothing more than a Samadhi of recent origin and it could not certainly be stated to have evolved into a temple by three arguments viz., (*a*) the extract from the judgment of Varadachariar, J., in *Board of Commissioners for the Hindu Religious Endowments* v. *P. Narasimham*[1], (*b*) the Samadhi contained all the indicia of a temple, and (*c*) the public worship is to the Sivalingam installed on the Samadhi, which is the deity and not to the Samadhi.

The following is the extract from the judgment of Varadachariar, J., relied upon by the learned Government Pleader :

"That what the evidence in this case describes as taking place in connection with the institution is public worship can admit of no doubt. We think it is also religious. The test is not whether it conforms to any particular school of Agama Sastras; we think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship, they are making themselves the object of the bounty of some superhuman power, it must be regarded as a religious worship."

In regard to the indicia of a public temple, he relies upon the decision of this Court set out in paragraphs thirtythree to fortyfive of the decision in *Elumalai Chetty* v. *Commissioner H. R. & C. E. Madras*[2], and add to these decisions the subsequent decisions in *Ramanatha Ayyar* v. *Board of Commissioners for H. R. E.*[3], *Mahadeva Gurukkal* v. *Commissioner of H. R. E., Board*[4] *Commissioner, H.R. & C. E.* v. *Kalyanasundaram Mudaliar*[5], and *Deoki Nandan* v. *Murlidhar*[6].

We have already discussed the scope of the observations of Varadachariar, J., about the possibility of having temples not governed by the Agama Sastras. But this does not mean that when according to the learned Government Pleader a Public temple was construsted as per Agama Sastras *viz*., with a *Dwajasthambam, Prakaram, Balipeetam*, etc., we can consider as irrelevant the established Shastraic injunction against constructing a temple over the tomb of a Brahmin widow not entitled to Sanyasam. We cannot invoke the Agama Sastras for one purpose and ignore it for another purpose, in the teeth of the decisions of this Court. *Gopala Muppanar* v. *Subramania Aiyar*[7], has laid down that Agama Sastras regulate the temple rituals, etc. In *Veluswami Goundan* v. *Dandapani*[8], it was held that where a temple is only an adjunct to the tomb, a dedication of property for daily worship, gurupuja and annual annadhanam, even though there is provision also for worship three times a day with offerings of neivedyam, etc., and a Sivalingam was kept and worshipped there, will be wholly unlawful and the gift invalid and it would not make

1. (1939) 1 M.L.J. 134.
2. 68 L.W. 260.
3. (1954) 1 M.L.J. 239.
4. (1956) 1 M.L.J. 309.
5. (1957) 2 M.L.J. 463.
6. (1957) S.C.J. 75 : (1957) 1 M.L.J. (S.C.) 28 : (1957) 1 An.W.R. (S.C.) 28 : A.I.R. (1957) S.C. 133.
7. (1915) 27 M.L.. 253.
8. (1946) 1 M.L.J 354.

it a temple and the Lingam would be regarded as an adjunct to the tomb. It is unnecessary to multiply other instances to show that such a Samadhi cannot be evolved into a temple notwithstanding the rituals and appanages betokening the character of a temple.

The learned Advocate Mr. T. M. Krishnaswami Ayyar points out : Sivalingam is an emblem of the omniscient and all-pervading God Entity. It is a matter of common faith that God lives in every human being and God living in the limitations of the human body is described as the Jivatma. It is ordained according to the Sastras and the aphorisms of the great Sages that the object of every worthy life must be to bring about the unification of the Jivatma, the human life, with the Paramatma, the universal life. On the background of this faith, the achievement of a pure and purposed life is understood to be the union of the Jivatma and the Paramatma. Hence when a man dies, the remains of the body, wherever it is buried, are associated with the habitation of the Jivatma which when it deserts the body is supposed to have coalesced with the Universal Paramatma, which is signified in the form of a Linga, which is being placed on the grave. The graves of religious minded Hindus of the Saivite class are found to be mounted with a Sivalinga. The indication is that a Jiva whose physical body lies buried has attained its Mukti or union with the God of the universe which is represented in the world of form and name and matter as Sivalinga. The installations of a Sivalinga on the graves of religious-minded persons are not by themselves intended as dedications for worship of the Universal God Siva as He is described. They are not constructions of temples to God but are resting places of a Soul which by its own goodness, the mercy of God and the pious wishes of relatives and friends interested in its attainment of Heaven reach sayujyam. It means no more than this "Here lies the remains of one whose life has united with the Lord ". In fact one has only to travel along the highway from Madras to Conjeevaram to see the innumerable saliyar tank with a Sivalinga placed therein reverently tended with flowers lamps, etc., on either side of the road. Similarly on the road side of the Nandavanams of Nadars around Virudhunagar. In the case of Vaishnavites, more often than not, a Thulasi plant is nurtured over the grave. In the case of pious Christians the Cross or the figure of the Virgin or some patron Saint or a symbol of the deceased is placed on the grave or tomb. The magnificent public cemeteries in Geneva, Florence and the tombs in the Church of Saint Peter at Rome are a few of the places where such symbols adorn the graves and are often the handiwork of the great Italian sculptors like Canova Michael Angelo, etc. They do not become churches notwithstanding the saying of prayers over the tombs by the pious Catholics or daily services like placing flowers, lighting lamps, etc.

The use and purpose of the symbol is two fold : (1) to set forth in visible or audible likeness what cannot really or fully be expressed to the physical eye or ear, or even clearly conceived by the limited faculties of the human mind. All language is in the last resort symbolic, and religious language in an especial degree, for it endeavours to present a mystery, a reality too deep for words. The Hindu faith had at its service a language of the utmost delicacy and flexibility, with a vigorous and fertile growth and an almost unlimited vocabulary and found itself in a world of tropical luxuriance, with a tropical wealth of beauty and suggestiveness. It was not to be wondered at that it became profuse in type and symbol and laid under contribution all the facts and phenomena of nature to serve its religious and priestly ends. All the great Gods had their resemblances, animal or material forms, in which they presented themselves embodied to human sight, which served to recall to the worshipper the deity, whose mind and character they more or less inadequately reflected. Other more rare and refined symbols were presentative of qualities or attributes, as the lotus, the emblems of spotless purity preserved under the most unfriendly conditions. All idols, totems, fetishes are symbols. The wise man does not worship the symbol, the shape in clay or wood or stone, but is thereby reminded of the invisible substance or reality which they each represent.

(2) The image or symbol serves the purpose also of providing in material and suitable form a convenient object of reverence, to meet the religious need of those whose minds, through darkness and ignorance, are unable to grasp the conception of an unseen formless deity. Such men, if left without a visible object to which their reverence and fear may attach themselves, will wander in a maze of doubt, disquiet, and unbelief. It is better that they should worship erroneously, worship a thing, than that they should not worship at all. There is much that might be urged in favour of the Hindu view that regards the worship of the external symbol as a stepping stone to higher, clearer forms of belief; it is a view unacknowledged perhaps but not unknown to other faiths. And in Hinduism, whatever may be said of or claimed by the wise and instructed thinker, the *Puja* of the multitude to the image of the God is reverent and sincere. In some respect also and within definite limits the Indian contention has justified itself that the symbol has proved a signpost and a guide to better, higher thoughts and to a truer worship of Him whom no form can express or language describe. (*See* Hastings Encyclopeadia of Religion and Ethics, Volume 12, page 142).

For an exposition of the symbolism of Sivalinga, see page 710 of Volume 4 of கலைக்களஞ்சியம் published by the தமிழ் வளர்ச்சி கழகம், சென்னை.

Therefore, as repeatedly decided in the decisions of this Court, the Sivalingam is only an adjunct to a tomb and it will not evolve the tomb into a temple.

The third point has already been discussed above and the mere fact that there are the appanages of a temple *plus* the front hall of Sri Ramana Maharishi, would not make this institution fall within the ambit of the cases set out above. A Samadhi of a Brahmin widow who died recently is a Samadhi and all the decisions of this Court cannot make it into a Hindu temple wherein Hindus can congregate for public religious worship as prescribed in the Sastras.

The net result of this analysis is that the institution under consideration is not a temple but is a religious public trust of a cosmopolitan character.

On that conclusion it follows that the issues have to be found as follows: Under Issue 1 that the Sri Mathrubhutheswarar shrine is not a temple within the meaning of Act XIX of 1951 and is only an adjunct of the Sri Ramanasramam, a public religious Trust, under Issue 2 that the orders in Original Appeal No. 58 of 1952 and Appeal No. 36 of 1953 are illegal and have to be set aside; and under Issue 3 that it does not arise for consideration.

The decree and judgment of the learned Subordinate Judge are set aside and the suit is decreed for plaintiffs to the above extent. There will be no order for party and party costs in the circumstances of the case. The plaintiff will take their costs out of the Estate.

Having come to the conclusion that the suit institution is a public religious trust and not a temple, we are also of the opinion that this is an eminently fit case where a scheme should be framed under section 92 of the Code of Civil Procedure. The learned Advocate Mr. T. M. Krishnaswami Ayyar for the appellants unhesitatingly shares our view. In fact the learned Advocate-General who appeared in Court at our instance was also agreeable to the framing of a scheme provided we came to the conclusion that this is a public religious trust and secondly indicated our views as to the necessity for the framing of a scheme. That if we came to the conclusion that the institution is not a temple as strenuously contended for by him but only a public religious trust, a scheme for the better management of the institution would be essential was not denied by the learned Government Pleader. Therefore, we direct that a copy of this judgment be forwarded to the learned Advocate-General for his taking the requisite action at an early date in the light of the observations made above.

Anantanarayanan, J.—I find myself in entire agreement with the conclusions of my learned brother in the Judgment just delivered, which I had the advantage

of study. I think that the question whether the suit institution is a 'temple' within the scope and definition of section 6 (17) of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), which is the crucial issue before us, is one that cannot be satisfactorily determined if we are to leave out of account, particularly when we remember that the foundation or dedication is so recent, the life and ideas of the founder, himself, and the unique circumstances of the case, as evident in the record. As for the definition in section 6 (17) itself, I am unable to see how it can be construed and applied apart from the entire purpose of the Legislation, or the scheme of the Act. I am in respectful agreement with the dictum of Balakrishna Ayyar, J., in *Seshachalam Chettiar Charities* v. *State of Madras*[1], that the Act itself is intended to apply only to religious institutions and endowments which are exclusively Hindu in character. It is with this broad perspective that we must approach the individual question of fact. In such a view, the words 'used . . . by the Hindu community or a section thereof, as a place of public religious worships' would be all-important, in the definition. Clearly we are not concerned here with a shrine, a place of worship, or by whatever other designation the place is known, which transcends Hindu credal categories altogether, or is non-Hindu, in character.

When this is borne in mind, I do not think that the case-law presents any peculiar difficulties. A *samadhi* over one who comes to be regarded as of the *Illuminati* or even the tombs of heroes, may evolve in course of time as a shrine of Hindu public religious worship. *The Board of Commissioners for Hindu Religious Endowments, Madras* v. *Pidugu Narasimham and others*[2], and *Ratnavelu Mudaliar* v. *Commissioner, for H. R. & C.E.*[3] relate to such instances. Nor is the existence or consecration of an idol, a prerequisite. See *Ramaswami* v. *The Board of Commissioners, Madras*[4]. But in all such cases, what must be essentially regarded, and never lost sight of, is the character of Hindu public religious worship evinced at such shrines, whether this has grown through the decades and attached itself to the institution, or whether it was the full-fledged purpose at the birth of the shrine. Where this is present and undeniable, it will not matter that the origin is un-Sastraic, that the temple evolved from a Samadhi, though ordinarily this conception is not in harmony with Hindu concepts, as emphasised in *Bodendraswami Mutt* v. *President, H. R. E. Board*[5], or if the *Agama Sastras* had been adhered to or not. In my view, it is with this background that we should comprehend and appreciate the dicta of Varadachariar, J., in the *Board of Commissioners for The Hindu Religious Endowments, Madras* v. *Pidugu Narasimham & others*[2], to the effect that the test was not whether the foundation conformed to any particular school of Agama Sastras, or of Viswanatha Sastri, J., in *Ramaswami* v. *The Board of Commissioners, Madras*[4], that it was sufficient that the worshippers considered themselves likely to be the recipients of the bounty or blessings of a Divine Presence, which they believed to exist at the place. Divorced from their contexts, such observations ought not to be interpreted as supporting a theory or thesis which would be opposed to the very purpose and scheme of the Hindu Religious and Charitable Endowments Act.

But though Hinduism is a pervasive creed, with a genius for the assimilation of protestant movement which sprang up from its own field, where such movements still retain their individuality and character, they ought not to be confused with it. Thus, I do not think that it could be seriously maintained that a Jain or Buddhist temple is a 'Hindu temple', though the founders of those creeds were Hindus, conscious perhaps of a purificatory evangelism, but not of a mission to destroy the background of religion that gave them birth. Equally, I do not think that it could be justifiably argued that a meditation hall of a Theosophical Society, or the *Durga* of a Muslim Saint with characteristic appanages (Pirs) is a 'Hindu temple' within the scope of the definition, merely because the Hindus also worship there in public on certain occasions. We must remember that the core of Hinduism is tolerance of all creeds, and a tendency to bow the knee at the shrines of all faiths. Surely, the Legis-

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1. W.P. No. 1357 of 1957.
2. (1939) 1 M.L.J. 134.
3. (1953) 2 M.L.J. 574.
4. (1950) 2 M.L.J. 511.
5. (1953) 1 M.L.J. 60.

lature never intended that shrines or places of congregation and prayer or meditation, essentially non-Hindu in purpose and spirit, should be assimilated to Hinduism, or to Hindu religious institutions by a kind of legal fiction. That is not the purport of the Act at all.

Particularly in the case of this institution where the life and teachings of the founder are so recent, and still vividly available to us, it will be a great mistake to ignore those aspects, and to assume that this shrine was ever intended to be a Hindu temple by its founder, or that it has already evolved into this, because of certain insignia, or of ritualistic worship, or the installation of a *Sivalinga* over the mortal remains of the mother of the Maharishi. My learned brother has already referred to, and discussed, these facts which so startlingly belie the interpretation that this shrine was ever intended to be a place of Hindu public religious worship or that it could be permitted to evolve into a Hindu temple, without desecration of the universal principles and of Realisation transcending all creeds including Hinduism, for which the Maharishi stood ; and which he expressed in his life. Certainly, those aspects which are definitely repugnant to Hindu notions of installation and worship ought not to be ignored, and this is no mere question of adherence to the *agama sastras* or perhaps unintentional and unknowing departures therefrom. The *samadhi* of a Brahmin widow, even if she was a most worthy and excellent person who gave birth to one who was surely among the *illuminati*, cannot be consecrated ground according to the Sastras. Without *prana pratishta*, which spiritiual descent cannot be invoked at such a place, there can be no idol ; and the *linga* installed can only be symbolic of a union (*sayujya*), like the Cross erected over a Christian tomb, as a symbol of redemption. The record is definitely against the interpretation that the *Maharishi* authorised the worship of his mother, as one who had attained realisation, a *mukta*. Certain words used by him support the interpretation on the contrary, that he considered all as *muktas*, and even included the dumb creation within the scope of his vast acceptance and affection. My learned brother has already referred to those facts which, if interpreted in the same mode, would authorise Hindu temple worship at the tomb of a cow or a pet monkey, which have equally found burial within the *ashram* premises.

The *Maharishi* described himself as an *atiyasrami*, literally one who has transcended the four *asrams* of Hinduism, like Sukha or Jada Baratha. Thus, he could not even be described as a *sanyasi*. His teaching was a method of introspection into the centre of the self within each and all of us, the meditation " Who am I?" carried on with ceaseless vigilance until the dawn of a perfect awareness obliterating the limited age. Such a teaching had its exemplary origin in the silence of the *avatar Dakshinamurthi*, rather than even the most refined metaphysics of *advaita vedantha*. Everything else appears to have been a concession to human frailties around him, which he did not care to meet with opposition. The record shows that the *Maharishi* could not be described as having devotees, for he gave no *diksha* (initiation) and acknowledged none as a disciple. He came away to Tiruvannamalai in his seventeenth year, penniless and friendless, and never accumulated wealth, personally speaking. He never married, and had no family ; even the provisions in his will relating to the continued management of the shrine and *ashram* after him by his *sanyasi* brother Niranjanandaswami (Sarvadhikari), and that line of descent, were clearly prompted by a concern to retain his abode at Tiruvannamalai as a spiritual centre, not for self-glorification or the security of dependants. Are we to seriously accept the hypothesis that such a person desired to exclude a Muslim, European or Parsee attracted to his teachings, from his shrine ? The *Maharishi* was perfectly aware of the normal postulates of Hinduism. He must have been aware that such a shrine over the *samadhi* of his mother, with a statue of himself as another symbol of adoration in the same hall, could be no Hindu temple. He was not an iconoclast, intent on a revolutionary transformation of Hindu creeds or practice. The probabilities are overwhelming that, as far as the founder's message, intentions and outlook are concerned, the *Mathhrubutheswar* shrine was not founded as a Hindu temple, but essentially as a public religious shrine or institution of a universal character. The evidence on record clearly establishes further that it is not a place of Hindu public religious worship

though the forms of *puja* or *archana* might be similar to those adopted in Hindu temples, but that it is a shrine in which all who are drawn to the Maharishi's teachings, whether Hindu, Christian, Parsi or Muslim, have equal rights of access and to the acquisition of spiritual benefit by prayer or meditation.

For these reasons, I concur in the judgment of my learned brother, and further fully endorse his view that it is most desirable in the interests of the wide public that a scheme should be framed under section 92 of the Civil Procedure Code for the better management of the shrine and the public trust or endowments relating thereto, conserving the universal spirit and character of this foundation so clearly expressed in the life and teachings of the Founder. I agree that this appeal should be allowed.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Thimmi Ammal .. *Appellant**

v.

M. V. Venkatarama Chetty .. *Respondent.*

Hindu Women's Rights to Property Act (XVIII of 1937), *section* 3 (2)—*Rights of a widow of coparcener in joint family property—If liable to be attached and sold in execution of a decree against her.*

The right of a Hindu widow in the joint family property of which her husband was a coparcener, devolving on her under section 3 (2) of the Hindu Women's Right to Property Act, is liable to be attached and sold in execution of a decree obtained against her, even though the amplitude of the estate is limited.

Saradambal v. *Subbarama Ayyar*, (1941) 2 M.L.J. 862 : I.L.R. (1942) Mad. 630, followed.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ramaswami dated 6th April, 1956 and made in A.A.A. O. No. 83 of 1954 preferred against the Order of the District Court, North Arcot, in A.S. No. 104 of 1953 (E.P. No. 215 of 1951 in O.S. No. 60 of 1949, District Munsif's Court, Tirupattur.)

G. R. Jagadisan, for Appellant.

T. L. Nagaraja Rao, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The only question in this appeal from the judgment of Ramaswami, J., is whether the right of a Hindu widow in the property of the joint family, of which her husband was a coparcener, devolving on her under section 3 (2) of the Hindu Women's Rights to Property Act, is liable to be attached and sold in execution of a decree obtained against her. The two Courts below and Ramaswami, J., have held that it can be. We are in entire agreement with this decision. Section 3 (2) of the Act is in the following terms :

" When a Hindu governed by any school of Hindu law other than the Dayabhag school or by customary law dies intestate, having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had ".

Sub-section (3) declares that any such interest shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner. We have no hesitation in holding that the interest which is conferred by section 3 (2) of the Act on the widow is an interest, over which she has a disposing power. It is not necessary to go into the question whether she is a coparcener along with the other coparceners. It is sufficient to hold that the interest which devolves on her is an undivided interest, but an interest which can be worked out by means of a partition. Such a right as her husband had devolves upon

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*L.P.A. No. 86 of 1956.

4th November, 1959 (13th Kartika, 1881, Saka).

her. The only limitation is as regards the amplitude of the estate. It is a limited interest known as the Hindu Woman's estate. In *Saradambal* v. *Subbarama Ayyar*[1], a learned Judge of this Court held that the undivided share obtained by a Hindu widow under section 3 (2) of the Act is liable to be attached by her husband's creditors. This decision has been consistently followed in this Court, and we are in respectful agreement with the principle laid down in the decision. In the case before us, the creditor is not the widow's husband's creditor, but her own creditor. But, on principle, that could not make any difference.

We cannot agree with Mr. G. R. Jagadisan, learned counsel for the appellant that the right which the widow obtains under section 3 (2) of the Act can only be worked out by a partition, and that, before partition, she will not have a disposing power over the interest which the statute confers on her. This contention cannot be accepted. Unless there is a substantive right in the widow, but a right which is undivided, she cannot have the consequential right of working it out in and by means of a partition. It has been held in *Dagadu Balu* v. *Namdeo Rakhmaji*[2], by a Division Bench of the Bombay High Court that an alienee from a Hindu widow of her life interest in the joint family property obtained by her is entitled to partition, that is, to the same right which she herself would have had under sub-section (3) of section 3. The appeal is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

T. Venugopal .. *Appellant**

v.

The Triplicane Urban Co-operative Society, Ltd., by its Secretary .. *Respondent.*

Civil Procedure Code (V of 1908), Order 9, rule 8—Suit dismissed for default—Conditional order of restoration—Default clause—Effect of.

Where a Court passes an order under Order 9, rule 8, Civil Procedure Code, directing the restoration of a suit dismissed for default on condition of payment of costs to the opposite party before a specified date and provides that in default of such payment the application will stand dismissed the Court no longer remains seized of the application but becomes *functus officio*.

Appeal against the Order of the III Assistant Judge, City Civil Court at Madras dated 3rd April, 1958 in I.A. No. 507 of 1955 in Original Suit No. 1363 of 1954.

T. R. Venkataraman and *T. R. Sangameswaran*, for Appellant.

B. V. Viswanatha Ayyar, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is an appeal by the petitioner in the lower Court in I.A. No. 507 of 1955, in Original Suit No. 1363 of 1954, on the file of the III Assistant City Civil Judge, Madras.

The facts are that by the order in I.A. No. 507 of 1955, the learned Judge directed this petitioner (appellant) to deposit a sum of Rs. 350 into Court on or before 2nd April, 1956, failing which his petition under Order 9, rule 9, of the Code of Civil Procedure, to restore the suit dismissed for default, to file, will itself stand dismissed. In this order, the learned Judge observes that this was not the first occasion when the plaintiff was absent or unready. The plea before him was that the plaintiff (petitioner) should be actually directed to pay into Court a sum of Rs. 750 being the costs of the suit and the costs of the application, before the order of dismissal was set aside.

1. (1941) 2 M.L.J. 862 : I.L.R. (1942) Mad. 630. 2. A.I.R. 1955 Bom. 152.

*C.C.C. Appeal No. 52 of 1956. 3rd December, 1959. (12th Agrahayana, 1881, Saka).

In the final paragraph of his order, the learned Judge observed that the respondent contended before him that the petitioner (appellant) should deposit the entire costs of Rs. 750, but that this was an onerous condition, and that taking the conduct of the plaintiff throughout into account, he determined the costs which ought to be deposited at Rs. 350. It is not denied before us that default was made in this deposit and that, in consequence the petition itself stood dismissed after the expiry of the period fixed for the deposit.

We might immediately state that there are two grounds upon which this appeal will have to be dismissed as quite unsustainable. The first ground, which is preliminary in character, is that where a Court passes an order for restoration of a suit dismissed for defaut on condition of payment of costs to the opposite party within a time fixed by the order, and where it directs that in case of default the application for restoration should stand dismissed, upon the expiry of such time fixed for payment, the Court no longer remains seized of the application, but becomes *functus officio* (*Gaya Din* v. *Lalita Prasad*)[1]. In view of this proposition, which is not disputed, the appeal itself will have to be dismissed *in limine*.

The second ground is that, even assuming that the order could be canvassed on the merits, since the appellant did not choose to file an appeal from the order directing him to make the payment of Rs. 350, we really cannot now proceed into the propriety of that order, or find that it is excessive and onerous. Apart from this, upon the admitted facts, we are unable to agree that the order was onerous, merely because the plaintiff was instituting the suit *in forma pauperis*.

In the result, the appeal which is seen to be devoid of merits, is dsmissed ; the parties to bear their own costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

K. N. Lakshmiah *alias* N. Lakshmiah Chettiar .. *Appellant**

v.

Hajee S. Abdul Azeez, Proprietor, Abdul Azeez and Co., by Agent, T. Mohamed Yusuf Marakayar .. *Respondent.*

Sale of Goods Act (III of 1930), *sections* 17 *and* 41 (2)—*Applicability—Sale by sample—Essentials—C.I.F. Contract—Buyer's right to inspect goods before taking delivery—Seller booking goods by rail and sending railway receipt and demand draft to bank—Duty of buyer—Property in goods—When passes.*

Section 17 of the Sale of Goods Act relates to a particular kind of sale known to trade usage as a sale by sample. To constitute such a transaction it is necessary that a particular sample should be agreed upon, between the parties, as that to which the goods supplied should correspond and there should also be a clear term in the contract that the sale will be with reference to such a sample. Even a sale at which a specimen of the goods is exhibited may nevertheless not be a sale by sample as it is consistent with the buyer relying on the description alone and not stipulating for conformity to the specimen produced.

Section 41 (2) of the Sale of Goods Act obviously relates to a case where the buyer is to be afforded an opportunity for examination and rejection of the goods before he actually takes delivery as one of the conditions of the understanding between the parties. But this rule is excluded is the case of a C.I.F. contract, the obligation of the seller being to tender the documents within a reasonable time, and he need not wait till the goods have arrived before calling upon the buyer to take up the documents.

Pollock and Mulla's *Indian Sale of Goods Act*, 2nd edition, pages 86 and 185 relied on.

The appellant entered into a contract with the respondent on 19th March, 1947, for the purchase of 150 cotton parachutes at Rs. 24-8-0 per parachute. The contract, *inter alia*, provided that the goods were to be booked by rail to Hindupur at the risk of the buyer and that every consignment refused or not taken delibery of would be sold by public auction and the buyer alone would be liable for the loss. The appellant was to pay the packing and cartage charges.

1. A.I.R. 1936 All. 477.

*L.P.A. No. 29 of 1956. 26th October, 1959. (4th day of Kartika, 1881—Saka)

The goods were despatched by train to Hindupur where the appellant was to receive them, and the railway receipt was sent along with a demand draft through a bank in Hindupur according to the usual trade practice. The appellant refused to honour the documents and take delivery of the goods pleading that he was entitled to " open delivery ", that is, that he would first make an inspection of the goods and then take delivery of them only if he was satisfied that the goods substantially corresponded with the description or with the sample which, he alleged he was shown. After further correspondence between the parties, the goods being left undelivered at Hindupur, the respondent advertised the sale of goods to be held on 5th August, 1957, but it was stopped and ultimately it was actually held on 24th August, 1947, through certain public auctioneers. A notice sent by the respondent of the sale did not, it appeared, reach the appellant before the date of sale.

Held (i) that there was a completed contract of sale and that dominion in the goods passed to the appellant as soon as the contract of sale was signed ;

(ii) the contract was not a contract by sample, and there was no term, either express or implied, to justify an inference to that effect;

(iii) there was absolutely no ground for any inference of any implied right of inspection in the appellant, and the terms of the contract totally exclude any such right ;

(iv) that it was the appellant who committed the breach of contract and occasioned loss through his negligence ; and

(v) that the respondent had a right to sell the goods in pursuance of the specific terms of the contract and the fact that a notice was sent which did not reach in time did not place the respondent in a worse position, as no notice was really required by the contract itself.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Basheer Ahmed Sayeed, dated 18th November, 1954 and passed in C.C.C. A. No. 34 of 1952 preferred against the decree of the City Civil Court, at Madras, in O.S. No. 721 of 1947.

T. S. Narasinga Rao and *M. Balachandrudu*, for Appellant.

M. M. Ismail, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is a Letters Patent Appeal by the deendant in O.S. No. 721 of 1947 on the file of the Additional Judge, City Civil Court, Madras. The appellant was also the plaintiff in O.S. No. 999 of 1947 on the file of the same learned Judge. The matter came up in appeal in C.C.C.A. No. 34 of 1952 before Basheer Ahmed Sayeed, J., and the learned Judge confirmed the findings of the City Civil Court, in both the suits, and dismissed the appeal of the present appellant (defendant) with costs. From that decision of the learned Judge, the present Letters Patent Appeal is before us.

The facts are quite simple. On 19th March, 1947, the appellant entered into a a contract with the plaintiff in O.S. No.721 of 1947 for the purchase of 150 cotton parachutes at Rs. 24-8-0 per parachute. This is evidenced by the document, Exhibit A-1 (page 15 of the printed papers) and there can be no doubt that it is a completed contract of sale between the parties, the purchaser (the appellant) to pay the packing and cartage charges.

We shall later come to the express and implied terms of this contract. The further facts were that the goods were despatched by train to Hindupur, the place where the appellant was to receive them according to the contract. The railway receipt was sent along with a demand draft through a bank in Hindupur, according to the usual trade practice. The facts are not in dispute before us that the appellant refused to honour the documents and take delivery of the goods, contending that he was entitled to what he termed 'open delivery', namely, that he would first make an inspection of the goods, and then take delivery of them, only if he was satisfied that the goods substantially corresponded with the description, or, with the sample which he alleged that he was shown. There was further correspondence between the parties, after the goods were left in this fashion undelivered at Hindupur, and, in accordance with one of the terms of the contract, the respondent firm advertised the sale of these goods to be held on 3rd August, 1947. The sale was originally stopped, but, ultimately, actually held on 24th August, 1947, through certain public auctioneers.

The point involved in the appeal is a simple one. It is whether, either upon the explicit terms of the contract, or, upon any implied term of such a contract with reference to the provisions of law applicable to the case (the Indian Sale of Goods Act) the appellant had a right in law to insist upon what he termed " open delivery", namely, inspection of the goods before he would take delivery of them, and honour the railway receipt and the demand draft. In other words, the question is whether it is the appellant that committed breach of the contract, or, whether it is the respondent who has done so.

The learned Judge (Basheer Ahmed Sayeed, J.) held that both upon the facts and the law, it was abundantly clear that breach of the contract was committed by the appellant alone. He also held that, under a particular term of the contract, the respondent was justified in holding a sale of the rejected goods, even though the notice might not have reached the appellant by that particular date. We are in entire agreement with this view, which appears to be the only view possible upon the facts, and in the context of the relevant legal principles. There can be no doubt whatever that the document, Exhibit A-1, evidences a completed contract of sale for the supply of goods, and that dominion in the goods passed to the appellant, as soon as this document was signed. It is sufficient, in this context, to refer to paragraph 7 of the contract, in which it is specified that the goods will be booked by the route at the risk of the customer or the buyer, and to paragraph 6, where it is laid down that every consignment refused or not taken delivery of, will be sold by public auction, and that the buyer alone is responsible for the loss.

What is now urged before us is that some vague right of inspection seems to be implied in the law, with reference to section 17 (1) and (2) and section 41 (1) and (2) of the Indian Sale of Goods Act. This argument, when examined, is found to be totally without substance. It is clear from a scrutiny of section 17 (1) and (2) that that section relates to a particular kind of sale, known to trade usage as a sale by sample. It is obviously necessary that a particular sample should be agreed upon, between the parties, as that to which the goods supplied should correspond, and also that there should be a clear term of the contract that the sale will be with reference to such a sample. It is sufficient here to observe that, in Pollock and Mulla's *Indian Sale of Goods Act*, 2nd Edition, page 86, the learned authors state:

> " A sale at which a specimen of the goods is exhibited may nevertheless not be a sale by sample, for, it is consistent with the buyer relying on the description alone, and not stipulating for conformity to the specimen produced".

This is sufficient to make an end of the argument that the present contract was impliedly a contract of sale by sample. No such express term, and not even any such implication can be spelled out from the facts of the case.

With reference to section 41, we may briefly state that section 41 (2), which alone can at all apply obviously relates to a case where the buyer is to be afforded an opportunity for examination and rejection of the goods before he actually takes delivery, as one of the conditions of the understanding between the parties. As Pollock and Mulla declare at page 185:

> " the rule declared by sub-section (2) is excluded in the case of a C.I.F. contract; the obligation of the seller being to tender the documents within a reasonable time, and he need not wait till the goods have arrived before calling on the buyer to take up the documents ".

This is precisely the situation here where the goods were consigned to Hindupur when it might take days for them to arrive, and the consignor sends the documents to the consignee, so that the consignee may be ready to take delivery. In fact, actual commercial or trade practice would come to a standstill, if, in every case of consignment by rail to a destination which may even be in another country, the consignee is presumed to have an implied right in law to inspect the goods before delivery, and then, to take delivery of them or to leave them at the spot at his option. Since the carrier's responsibility must admittedly cease when the consignee has an opportunity to take delivery, the result of this will be that such implication will work havoc in trade practice, and bring commerce to a standstill. We have been shown absolutely no ground for any inference that this is implied in the law on the subject. Clearly, he terms o f the contract in the present case totally exclude it.

Further, we are constrained to point that there is not a hint of the claim now advanced in the evidence of the appellant, Lakshmiah Chetty, as D.W. 1 (page 47 of the printed papers). All that the witness states is that the plaintiff said that sales-tax would not be charged, and that, as the Bank did not furnish him with details for the amount, he failed to honour the document, and also that he did not take delivery of the goods. There is not a hint or trace of the suggestion that there was any understanding between the parties, that, at Hindupur itself, he could inspect the goods and then refuse to take delivery of them, if he was not satisfied with the correspondence between the actual goods and the description.

In brief, we are clearly of the view that it is the appellant alone who committed the breach of contract, and occasioned loss through his negligence. The re-sale itself was in pursuance of a specific term of the contract, which clothed the respondents with the right to sell the goods at the risk of the buyer. The fact that they sent a notice which did not reach in time, cannot place them in a worse position, when no notice was really required by the contract itself. For authority upon this point reference might be made to *Tuken Singh* v. *Hanuman Das*[1]. This appeal seems to be totally lacking in merits, and it is accordingly dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Vadivelu Mudaliar .. *Appellant**

v.

The State of Madras by Collector of Madras. .. *Respondent.*

Madras Estates Land Act (I of 1908)—If applicable to areas formerly outside the limits of the City of Madras but subsequently included in city limits—Rights of Zamindar over beds of abandoned tanks and channels.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 18—Applicability to building sites in estates vested in the Government.

To ascertain whether a certain enactment applies to a particular case the position as it stands on the date on which the provisions are sought to be applied is material. An Act when originally enacted might be applicable to areas within definite limits but if subsequently certain areas are taken out of the limits, the Act would cease to apply to such areas.

The Madras Estates Land Act is specifically made inapplicable to the Presidency Town of Madras and if on the date on which the provisions of the Act are sought to be applied certain areas formerly outside the Presidency Town and as such governed by the Act, has become part of the Presisdency Town, then automatically the application of that Act would cease to such areas from that date when they came to be so included within the limits of the Presidency Town even though at some time in the past the Act was applicable to the area.

Ordinarily the proprietor of an Estate would be entitled to the beds of abandoned tanks and channels within the limits of the Zamindari. Hence a Zamindar could validly give a patta in respect of such lands.

The appropriate provisions of the Estates Abolition Act applicable to the case of a person who has been lawfully in occupation of the bed of an abandoned channel or tank in an erstwhile zamindari and using it as a building site will be section 18.

On appeal from the Judgment and Decree of the Honourable Mr. Justice Ramaswami, dated 15th April, 1954 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 25 of 1951.

N. Suryanarayana and *N. Sekhar*, for Appellant.

The Government Pleader (*K. Veeraswami*) and *V. Ramaswami*, for Respondent.

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1. (1902) 7 Cal. W.N. 108.

* O.S.A. No. 46 of 1955 29th October, 1959. (7th Kartika, 1881—Saka).

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal from the Judgment of Ramaswami, J., arises out of a suit filed on the Original Side of this Court, C.S. No. 25 of 1951, by one Vadivelu Mudaliar, the appellant beore us, *in forma pauperis* for a declaration of his title to the suit land and for an injunction restraining the State of Madras from evicting the plaintiff from the suit land. The land in suit is 19 cents in extent and situated in Thiagarayanagar in the City of Madras. It admittedly formed part of the zamin village of Mambalam. The plaintiff claimed that in consideration of Rs. 50 paid by the plaintiff to the Zamindarini of Mambalam the latter granted a patta to him on 17th October, 1934, in respect of the suit land. Admittedly he has been in possession of the suit land from the date of the patta and he has put up a structure thereon. On 9th May, 1949, the Tahsildar of Madras called upon the plaintiff to vacate the suit land. In spite of the plaintiff's objection the Collector of Madras passed an order for eviction. The Board of Revenue upheld that order. The plaintiff was therefore compelled to institute this suit. In paragraph 7 of the plaint the plaintiff stated that though the suit land was originally part of the site of a channel for drainage of surplus water from a tank that existed on the north of Madley Road, the tank ceased to be used as such long ago and the channel also ceased to be used as such. The Zamindarini assumed possession of the site of the abandoned channel in exercise of her right as zamindar and granted patta to the plaintiff. The defence of the Government was based on the assertion that the suit land belonged to the Government as channel poramboke. They relied on certain entries in the course of survey which was finalised in 1943 and pleaded that the plaintiff was not entitled to challenge the correctness of the entry. The case of the State was that the plaintiff had encroached on what was Government property and therefore proceedings under the Land Encroachment Act were justified. The learned Judge, Ramaswami, J., who tried the suit took very little evidence. He rejected the plaintiff's claim on the ground that the poramboke and public lands in the zaminari did not vest in the Zamindarini and the provisions of section 20-A of the Estates Land Act were not complied with in as much as there was no order in writing from the District Collector converting the suit land to be used for purposes other than the purpose for which it was being used. The learned Judge apparently was not satisfied with the proof of the title set up by the plaintiff. Patta granted to the plaintiff no doubt was filed but the learned Judge apparently thought that it was not sufficient. He further found that the plaintiff had not succeeded in establishing his title by adverse possession. In the result he found that the suit land did not belong to the plaintiff and the plaintiff was not entitled therefore to the declaration and injunction sought. He dismissed the suit with costs. Hence this appeal by the plaintiff.

We are unable to agree with the learned Judge that the plaintiff has not proved his title derived from the Zamindarini. The patta granted to him was filed and there appears to have been no question of its genuineness. Nowhere in the written statement was a denial of the grant of a patta to the plaintiff. If really the Government had at the trial contested this claim of the plaintiff, namely, that he was granted a patta in 1934, it would not have been difficult for the plaintiff to have summoned records from the Zamin Office to substantiate his case. We hold that the plaintiff has proved that he was granted a patta in 1934 for the suit land by the Zamindarini of Mambalam.

Obviously even though a patta might have been granted to the plaintiff, he cannot succeed in the suit unless he also established that the Zamindarini was entitled to grant him patta for the suit land. It is common ground that the suit land was originally part of a site of drainage channel to take off surplus water from the Mambalam tank which then existed in this area. It is alleged by the plaintiff, and it is not denied, that the tank ceased as such long ago and consequently the channel also ceased as such. Admittedly the suit site lay within the geographical limits of the Mambalam Zamindari. Whatever may be the position so long as it was used as a drainage channel, once the channel ceased to be as such, the Zamindarini as the proprietrix of the estate would be entitled to the bed of the channel. It is not for us to

determine whether the land became ryoti land on and after the abandonment of the site as a channel. It is sufficient to say that the title to the bed of the channel vested in the Zaimndarini. Ordinarily the proprietor of an estate would be entitled to beds of abandoned tanks and channels.

There remains the objection raised by the Government that the procedure laid down in and by section 20-A of the Madras Estates Land Act was not followed and no order in writing was obtained from the Collector permitting the conversion of the land into land which could be used for purposes other than the original purpose for which it was set apart. This objection, however, must, in our opinion, fail because the Madras Estates Land Act ceased to apply to the areas which came to be included within the limits of the Presidency Town of Madras. Certainly by the date of the suit it was not denied that the suit land came to be situated within the limits of the Presidency Town. The learned Government Pleader contended that once the area in which the suit land is now situated was outside the limits of the Presidency Town at the time of the coming into force of the Madras Estates Land Act, 1908, the fact that subsequently the area came to be included in the Presidency Town would not render the Madras Estates Land Act any the less applicable to that area. On principle we are unable to acept this contention. Section 1 of the Estates Land Act says that the Act shall extend to the whole of the Presidency of Madras except the Presidency Town, the district of Malabar and the portion of the Nilgiri district known as the South East Wynad. To ascertain whether a particular enactment applies to a particular case, the position as it stands on the date on which the provisions are sought to be applied is material. It is not sufficient to say that some time in the past the Act was applicable to the suit area. If on the date on which the provisions of the Madras Estates Land Act are sought to be applied, the area has become part of the Presidency Town, then automatically the application of the Act could cease from the date on which the area came to be included within the limits of the Presidency Town. Certain observations of Rajagopala Ayyangar, J., in C.M.P. No. 383 of 1951, which was a petition for the issue of a writ of *mandamus* directing the Mâdras Sate to forbear from taking over possession of the estate known as East Mambalam and West Mambalam in pursuance of a notification in the *Fort St. George Gazette*, dated 12th December, 1950, were relied on. The learned Judge said :

> "...........I am of the opinion that the Estates Land Act of 1908 applied to zamin Mambalam on the date on which that enactment was passed and it continued to be applicable to it notwithstanding that the area became included within the City Limits at a subsequent date. I am not aware of any principle of law or of construction under which by mere extension of the City Limits, laws which previously applied to the areas, which were outside the City, must be deemed repealed in their application to them by reason of their being brought within the City ".

With respect to the learned Judge, there is no question here of any repeal. To give an obvious instance, there may be an Act which applies to all Hindus. On the date of the passing of the Act, a certain person may be a Hindu and so the provisions of the Act would apply to that person ; but subsequently if that person is converted to another religion and ceased to be a Hindu and a question arises at a later date whether the enactment applies to him, surely it cannot be said that because when the Act was passed he was a Hindu and the Act would apply, the Act would continue to apply though he ceased to be a Hindu. This instance is obvious. But in our opinion the position is equally obvious in the case of areas. An Act when originally passed might be applicable to areas within definite limits, but if subsequently those areas were taken out of the State whose legislature passed the law, such areas would cease to be governed by that enactment though at the time of the passing of the enactment it applied to such areas. The learned Government Pleader contended that when there was an incorporation of a definition by reference, any change of definition in the original Act would not automatically be imported into the subsequent enactment. We entirely agree. But nothing of the sort has happened here. The definition of ' Presidency Town ' continues to be the same even now. Only there has been a change in the limits of that territory. We may state that the above observations were made by Rajagopala Ayyangar, J., in a case in which the applicability of the provisions of the Madras Estates Land Act as such wâs not

in question. The learned Judge was dealing with the validity of a notification issued under Madras Act XXVI of 1948 and the only question which the learned Judge had to decide was whether that Act applied to the two parts of the Mambalam Zamindari. In our opinion on the date of the suit the provisions of the Madras Estates Land Act were not applicable as such to the area in which the suit land was situated. The State, therefore, cannot raise any contention based on the absence of an order in writing on the provisions of section 20-A of the Madras Estates Land Act. In the result we hold that the plaintiff be declared to be entitled to the suit land.

It is, however, necessary to mention certain events which have happened since the institution of the suit. The suit was instituted on 4th May, 1950. On 12th December, 1950, a notification was issued under Madras Act XXVI of 1948 and on 3rd January, 1951, the State purported to take over the two divisions of the Mambalam estate. Actually certain proceedings in this Court prevented the Government from taking over possession till 8th April, 1958. From that date the Government have been in uninterrupted possession of the Zamindari. Under section 3 (*b*) of Madras Act XXVI of 1948 the entire estate will vest in the Government subject to rights specifically recognised in the other provisions of the Act. This is not a case of a ryoti land but a case of a building and site on which the building stands and adjacent land. Section 18 (4) of Madras Act XXVI of 1948 appears to be the appropriate section. The hut and the site would vest in the plaintiff whom we have now declared to be the owner. There may be a question, however, as to the adjacent land and if there is controversy between the plaintiff and the Government as to the extent which must be deemed to have vested in the plaintiff under sub-section (6) of section 18, it would be for the Government to decide the controversy. Subject to this remark the appeal is allowed and there will be a decree declaring that the plaintiff is entitled to the suit property subject to the provisions of Madras Act XXVI of 1948. In the appeal the appellant will be entitled to costs limited to the Court-fee paid and the cost of printed papers, if any. In the trial Court there will be no order as to costs.

And this appeal having been set down this day for being mentioned, the Court made the following

ORDER:—The suit was filed *in forma pauperis*. But as the plaintiff has succeeded though we did not make any order as to costs, we think in the circumstances the plaintiff need not be called upon to pay the Court-fee due on the plaint to the Government.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras by Deputy Commissioner of Commercial Taxes, Madras Division .. *Petitioner**

v.

Haji Shakoor Mohamed Essa .. *Respondent.*

Madras General Sales Tax Rules (1939), *rules* 17 (1) (*a*) and 17 (3) (*a*)—*Applicability and socpe of—Assessment by Deputy Commercial Tax Officer—Appeal disposed of by Commercial Tax Officer—Escaped turnover—Jurisdiction to assess—Duty of Deputy Commercial Tax Officer.*

Rule 17 (1) (*a*) and rule 17 (3) (*a*) have to be read together and in a case covered by rule 17 (1) (*a*), the assessing authority is the authority that dealt with the appeal under section 11 of the Act. Where the appeal of the assessee against the original order of assessment of the Deputy Commercial Tax Officer was dealt with by the Commercial Tax Officer, it is the latter who is clothed with the jurisdiction to assess the escaped turnover. The duty of the original assessing authority (the Deputy Commercial Tax Officer), when he discovers that there was a turnover that had escaped

* T.R.C. No. 61 of 1957. 4th December, 1959. (13th Agrahayana, 1881—Saka.)

assessment, is to issue a notice under rule 17 (1) and, thereafter, submit the records to the Commercial Tax Officer who dealt with the appeal, as required by rule 17 (1) (*a*), and not to make a re-assessment himself. If there has been an appeal under section 11, rule 17 (1) (*a*) comes into play, and the Deputy Commercial Tax Officer, when he discovers that there has been a turnover that has escaped assessment, has only to submit the records to the Commercial Tax Officer who is constituted the assessing authority in such case by rule 17 (3) (*a*).

Petition under section 12-B (1) of the Sales Tax Act, praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 18th April, 1957 and made in Tribunal Appeal No. 1062 of 1956 preferred against the order of the Commercial Tax Officer, North Madras, relating to the assessment year 1952-53 in Appeal No. 107 of 1956-1957 dated 13th August, 1956.

The Government Pleader (*K. Veeraswami*) and *G. Ramanujam*, for Petitioner.

R. Krishnaswami Ayyar and *M. A. Ghatala*, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—This application, preferred by the State under section 12-B of the Sales Tax Act, arose out of the proceedings to assess the assessee for the year of assessment, 1952-1953. The original order of assessment was passed by the Deputy Commercial Tax Officer as the assessing authority on 10th February, 1954. The assessee preferred an appeal to the Commercial Tax Officer against that order of assessment and that appeal terminated on 29th June, 1954. Subsequent to that in March, 1956, the Deputy Commercial Tax Officer took action under rule 17 (1) of the Madras General Sales Tax Rules and issued a notice to the assessee to show cause why the turnover that had escaped assessment in the original assessment should not be subjected to assessment. On 31st March, 1956, the Deputy Commercial Tax Officer assessed the escaped turnover by adding a little over Rs. 75,000 to the turnover which was originally taxed. Against the order, dated 31st March, 1956, the assessee preferred an appeal to the Commercial Tax Officer, who dismissed it on 13th August, 1956. A further appeal was preferred by the assessee to the Tribunal. The Tribunal held that, as the Deputy Commercial Tax Officer had not conformed to the requirements of rule 17 (1) (*a*), the order, dated 31st March, 1956, had to be set aside. It was the correctness of that decision that was challenged by the State.

One of the points taken before the Tribunal was that, as the assessment of the escaped turnover related to the assessment year 1952-1953, sub-rule 1 (*a*) and sub-rule 3 (*a*) of rule 17, which were issued subsequent to the termination of the assessment year 1953, could have no application. That was rightly rejected by the Tribunal, and that plea has not been persisted in before us.

The Tribunal, in our opinion, was right in the interpretation it placed on the scope of rule 17 (1) (*a*). Rule 17 (1) (*a*) and rule 17 (3) (*a*) have to be read together, and in the case covered by rule 17 (1) (*a*) the assessing authority is the authority that dealt with the appeal under section 11. In this case it was the Commercial Tax Officer, who had dealt with the appeal of the assessee against the original order of assessment, that was clothed with the jurisdiction to assess the escaped turnover. The duty of the original assessing authority, the Deputy Commercial Tax Officer, when he discovered that there had been a turnover that had escaped assessment, was to issue a notice under Rule 17 (1), and thereafter submit the records to the Commercial Tax Officer as required by rule 17 (1) (*a*). That the Deputy Commercial Tax Officer did not do in this case.

On behalf of the learned Additional Government Pleader stress was laid on the passage in rule 17 (1) (*a*) 'where in respect of the turnover referred to in sub-rule (1) an order has already been passed under section 11. . . . . ' obviously the turnover cannot refer to the escaped turnover which is also referred to in rule 17 (1). Rule 17 (1) refers to the whole or any part of a turnover that has escaped assessment. Against the original assessment of the turnover there was an appeal, and subsequently it was found there was an escape of assessment when that turnover was assessed. In such circumstances, if there has been an appeal against the ori-

ginal order of assessment under section 11, rule 17 (1) (*a*) comes into play, and the Deputy Commercial Tax Officer, when he discovers that there has been a turnover that has escaped assessment, has only to submit the records to the Commercial Tax Officer, who is constituted the assessing authority in such a case by rule 17 (3) (*a*).

As we said, the view taken by the Tribunal is correct. The petition fails and is dismissed with costs. Counsel's fee Rs. 100.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

V. Arumugham Pillai .. *Appellant**

v.

N. R. M. Tulasi Konar and others .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 2 (a) and (ee)—'Cultivating tenant'—Land demised for storing groundnut husk—Conversion by the lessee into cultivable land—Tenant if a cultivating tenant as defined.

The lessee, a mill-owner who has converted the adjoining land demised for stocking groundnut husk into a cultivable land by cultivating cholam on a portion of it, cannot, by reason of that, acqurie the character of a ' cultivating tenant ' as defined in the Act.

The Act seems to be designed to protect from eviction only the actual tillers of the soil and not the intermediaries.

The very fact that the lessee has made such an alteration to the detriment of the reversion would constitute an act of waste entitling the landlord to determine the tenancy.

Appeal against the decree of the Court of the Subordinate Judge of Tiruchirapalli in A.S. No. 98 of 1959, preferred against the decree of the Court of the District Munsif of Karur in O.S. No. 211 of 1957.

N. S. Raghavan, for Appellant.

(Respondent not represented).

The Court delivered the following

JUDGMENT.—This Second Appeal is sought to be preferred against the decree and judgment of the learned Subordinate Judge of Tiruchirapalli in A.S. No. 98 of 1959, confirming the decree and judgment of the learned District Munsif of Karur in O.S. No. 211 of 1957.

The facts are : The suit property admittedly belonged to P.W. 3 Venkatesalu Naidu. It was leased out to the defendant as per lease deed Exhibit A-5, dated 19th June, 1943, for a period of one year. The defendant has been subsequently holding over. It was specifically leased out for the purpose of storing Kadalai Pottu or husk of groundnut, by the adjoining mill-owner, *viz.*, the lessee. This plot of land has come to be known as Pottu Medu or elevation for storing husk. The rent was fixed at Rs. 6-4-0 per month. Subsequently, when the lessor had given notice determining the tenancy and for evicting the lessee, the latter seeks to resist the former on the ground that he has been cultivating a portion of the land demised with cholam, etc., and that therefore the tenancy has become a tenancy of agricultural land and that he (lessee) has become a protected tenant under the Madras Cultivating Tenants' Protection Act.

Both the Courts below held that the defendant is not a cultivating tenant and ordered his eviction. Hence this Second Appeal by the defeated defendant.

The Madras Cultivating Tenants' Protection Act states in its Long Title that it is an Act for the protection from eviction of cultivating tenants and the Preamble to the Act states that the Act was enacted as it was necessary to protect cultivating tenants. Section 2 (*a*) defines a cultivating tenant, as meaning a person who carries

* S.A. No. 1553 of 1959. 23rd December, 1959. (2nd Pausa, 1881—Saka).

on personal cultivation on land under a tenancy agreement, express or implied. It has been held in *Kunchitapadam Pillai* v. *Ranganatha Pillai*[1], that a cultivating tenant need not do physical labour in respect of the cultivation work and that even a person who assumed the risk of cultivation and is not the paid agent of another person and who directly supervises the work of cultivation will be a cultivating tenant. But as pointed out in a recent commentary on the Act by Sri Varadarajan and Sri Venkatasubramanian, this interpretation is not in accordance with clause (*ee*) of section 2 which runs as follows :—

"A person is said to carry on personal cultivation on a land when he contributes his own physical labour or that of the members of his family in the cultivation of that land ".

In fact the Act seems to be designed to protect from eviction only the actual tillers of the soil and not intermediaries who are in no better position than the landlord. The word " cultivation " has been defined as meaning the use of lands for the purpose of agriculture or horticulture. It is now well-settled that a tenant cannot convert one kind of land into another and assume for himself a new character, for example, cultivating tenant. On the other hand, such an act would constitute a waste and the reverse of which is provided for in clauses (*b*) and (*c*) of section 3 (2). Woodfall on *Landlord and Tenant*, 25th Edition, at page 800, states :

" An act which alters the nature of the thing demised is wate.......If the tenant converts arable land into weed, or conversely, or meadow into arable, it is waste ; for it changes not only the course of husbandry, but creates a difficulty in the proof of title........"

Foa's *General Landlord and Tenant*, Eighth Edition, at page 285 :

" ....coverting one kind of land into another, *e.g.*, arable land into weed, or meadow into arable, are instances of voluntary waste in lands ".

Fawcett's *Law of Landlord and Tenant*, Third Edition, at page 349 :

" Further it is technically waste to change the nature of the thing demised........But although the above acts are technically waste, they do not as a rule constitute actionable waste, unless they in fact cause injury to the reversion......The test of actionable waste is whether the alterations complained of constitute an injury to the inheritance ".

Bearing these principles in mind, if we examine the facts of this case, we find that first of all, the appellant who has coverted the land demised for stocking groundnut husk into a cultivable land, cannot by reason of that unilateral alteration and without the permission of the landlord, give himself the character which he cannot acquire, *viz.*, as a cultivating tenant. Secondly, the very fact that he has made such an alteration to the detriment of the reversion would constitute an act of waste entitling the landlord to determine the tenancy. The land in question is valuable, because it is a raised portion which can be made use of for stocking husk and will be in demand by the adjoining mill-owners. But if it is converted into a third rate land for sowing ragi it will lose its special value to the lessor and would certainly be injurious to the inheritance.

Therefore, looked at from either point of view, the Courts below rightly found in favour of the plaintiff and decreed the suit. This Second Appeal is dismissed.

V.S. *Appeal dismissed.*

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1. (1958) 71 L.W. 231.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Sri Jey Cherish and Company, Ltd. .. *Petitioner**

v.

The State of Madras by Dy. Commercial Tax Officer, Mannady Division .. *Respondent.*

Madras General Sales Tax Act (*IX of* 1939), *section* 5 (vi)—*Madras General Sales Tax* (*Turnover and Assessment*) *Rules* , *rule* 16 (2)—*Applicability—Purchase of raw hides and skins by registered tanner and tanned in tanneries not belonging to the assessee—Liability to tax on such purchase—Section* 12-*B* (*k*)—*New plea in revision—Permissibility.*

A person who is a registered tanner and who tans, in the course of his business, raw hides and skins bought by him, in a tannery which was not his, would be liable to be assessed in respect of the raw hides and skins purchased by him under rule 16 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules. The fact that the assessee had the hides and skins tanned within the State at tanneries that did not belong to him would not make him any the less a registered tanner within the meaning of rule 16 (2) or exclude the application of rule 16 (2).

A new plea involving investigation of facts which was not raised at any earlier stage cannot be allowed to be put forward by the assessee at the stage of revision under section 12 (*b*) (1) of the Madras General Sales Tax Act.

Petition under section 12-B (1) of the Madras General Sales Tax Act, presented to the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 19th August, 1955 and made in T.A. No. 453 of 1955.

G. R. Jagadisan and *T. V. Balakrishnan*, for Petitioner.

The Government Pleader (*K. Veeraswami*), on behalf of the Respondent.

The Judgment of the Court was pronounced by

Rajagopalan, J.—The disputed turnover was Rs. 1,05,955-11-2. It was common ground that this represented the price at which the assessee purchased untanned hides and skins. The further findings were that these untanned hides and skins were got tanned in other tanneries by the assessee, and that the tanned hides and skins were eventually sold by the assessee for purposes of export. The Tribunal, agreeing with the departmental authorities, held that the assessee was liable to be assessed to sales tax on this turnover. Apparently the basis of the liability was sought in rule 16 (2) of the Turnover and Assessment Rules, 1930, as they stood in the relevant assessment year 1952-1953.

Both before the Appellate Authority and the Appellate Tribunal the stand taken was that, as the assessee did not tan these hides and skins in any tannery of his own, the tax liability imposed by rule 16 (2) was not attracted. That contention, in our opinion, was rightly rejected in the circumstances of this case. In the relevant year of assessment the assessee held a licence both as a dealer and as a tanner. It was true that the authorities upheld his plea, as a question of fact, that these hides and skins were not tanned in any tannery that belonged to the assessee. Nonetheless, it was certainly a reasonable inference from the facts proved, that the Tribunal confirmed, that it was as a registered tanner that he purchased the goods. The fact that he had them tanned within the State at tanneries that did not belong to him did not make him anytheless a registered tanner within the meaning of rule 16 (2).

Learned counsel for the assessee next contended that to make a person a tanner a course of dealings would have to be established. Such a point was never taken at any stage before. For example, even the Tribunal was not asked to investigate any plea that this turnover represented an isolated tranaction, and did not constitute the turnover of a course of dealings in the year of assessment. A new question involving investigation of facts not raised at any stage before, the assessee cannot be allowed to put forward at this stage.

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* T.R.C. No. 64 of 1956. 1st September, 1959. (10th Bhadra, 1881—Saka).

Learned counsel for the assessee next referred to rule 16 (3) and contended that rule 16 (2) had to be read consistently with rule 16 (3) and that rule 16 (3) could not be availed of by the assessee. He would be subject to a tax at the purchase point on purchases of untanned hides and skins and taxed again at the sales of tanned hides and skins, because no tannery of his paid the tax within the meaning of rule 16 (3). This contention again was not put forward before the Tribunal. Learned counsel for the assessee recognised as a factual position that on the sales of the tanned hides the assessee was not subject to any tax liability. The word " tannery " as used in rule 16 (3) has to be considered consistently with the scheme of the rules. The tax is to be paid by a person that is a tanner. It is not necessary for us to consider in this case, whether a person who gets hides and skins tanned elsewhere should be deemed to be the owner of a tannery within the scope of rule 16 (3).

In the circumstances of the case, as we said, the fact that the assessee was proved to have got the untanned hides and skins tanned in the tanneries other than his own made no real difference to the tax liability, to which he was subjected under rule 16 (2) as a registered tanner.

The petition fails and is dismissed with costs. Counsel's fee Rs. 100.

P.R.N. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

The State of Madras, by Collector, Ramanathapuram .. *Appellant**

v.

K. M. S. Muhammad Ismail Rowther and others .. *Respondents.*

Madras Estates (Reduction of Rent) Act (XXX of 1947), section 3 (2)—Applicability—Inam grant of whole village—Power of Government to issue notification—Village consisting of private lands—If exempt.

In the case of an inam grant of an entire village, the village is an 'estate' as defined by section 3 (2) (*d*) of the Madras Estates Land Act (1908), and Madras Act(XXX of 1947) would apply to such a village. Even if all the lands in the village are assumed to be private lands, as defined in section 3 (10) of the Estates Land Act, the Government has power under section 3 (2) of Madras Estates (Reduction of Rent) Act to issue a notification under that Act.

Govindaswami Naidu v. *T. P. Devasthanam*, (1954) 2 M.L.J. 702, confirmed in appeal in *Govindaswam Naidu* v. *T. P. Devasthanam*, (1956) 2 M.L.J. 260, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Ramanathapuram at Madurai in Original Suit No. 50 of 1954.

The Government Pleader (*K. Veeraswami*) and *P. Ramachandra Raju*, for Appellant.

R. Kesava Ayyangar and *K. Parasaran*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by defendant 1 (The State of Madras represented by the District Collector of Ramanathapuram at Madurai) in a suit filed by the plaintiffs in the Court below (the landholders) for a declaration that Madras Act XXX of 1947 could not apply to the suit village, Therku Kottagudi. The plaintiffs below pleaded that the suit village was granted as Dharmasanam inam to their ancestors, as a hereditary grant, and that the grant was confirmed by the Inam Commissioner on 16th February, 1864, under Title-deed No. 448. An important fact, which has to be stressed at the outset itself, is that this was a grant of an entire village, and not merely of any portion or part of a village. Under those

* Appeal No. 239 of 1956. 24th October, 1959. (2nd Kartika, 1881—Saka)

circumstances, whether the original grant was of both the warams or otherwise, there is no difficulty in arriving at the conclusion that the village itself is an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act (I of 1908). That point being not in controversy, we may proceed further.

The Government (appellant) have issued a notification with respect to ryoti lands in this village under section 3 (2) of the Madras Estates (Reduction of Rent) Act XXX of 1947. When we look at the Act, we find that, under section 1 (2), " it applies to all estates as defined in section 3 (2) of Madras Estates Land Act, 1908 ". Hence, by logical and necessary implication, the Government would be clothed with the power to issue the norification under Madras Act XXX of 1947. What is urged before me by learned counsel for the plaintiffs (landholder) in support of the judgment now appealed against, is that the Preamble to Madras Act XXX of 1947 shows that that legislation was enacted to provide for reduction of rents upon ryoti lands in such estates to the level of ryotwari assessments in the neighbourhood and that must be construed as the purpose of the Act.

What the plaintiffs (landholder) attempted to prove in the lower Court was that the entire lands in this village were " private lands." within the meaning of section 3 (10) of the Madras Estates Land Act. Not being ryoti lands, and not being lands in respect of which there were occupancy rights, the notification of the Government was misconceived and illegal. I think it can be very simply shown that this reasoning is fallacious. The question is not whether or not there are ryoti lands in the village. The learned Subordinate Judge has found, upon the merits, that all the lands in this village are " private lands " of the landholder and not ryoti lands. First of all, all the supposed ryots were not parties to the suit, and it is very difficult to see how such a finding would bind the parties really affected by it, namely the persons who claim to be ryots in respect of these holdings. Secondly, it is obviously insufficient to arrive at such a finding upon the basis of a few documents, or the general evidence. Since, conceivably, there may be some individual ryoti lands, while the rest of the lands may be 'private' or the true state of affairs may be *vice versa*, the only proper finding can be with respect to each holding or paimash number, and in the presence of the affected party who claims to be the ryot concerned.

There can be no doubt that, with regard to a village to which Madras Act XXX of 1947 applies, the Government have power under section 3 (1) to direct their Special Officer to submit his recommendations with regard to the matters specified in that section. They have power, under section 3 (2) of the Act, thereafter, to issue a notification like the one actually printed at page 59 of the printed papers, determining the rates of rent payable in respect of each class of ryoti land in the estate.

The landholder is not aggrieved by any of these steps taken by the Government, so long as it is indisputably established that the village is an estate, to which Madras Act XXX of 1947 applies. There is ample authority for the position that the Act could apply to an estate of that character, even assuming (without conceding) that all the cultivable lands in that village are ' private ' lands and not ryoti lands. I think it is sufficient, in this context, to refer to the observations of Krishnaswami Nayudu, J., in *Govindaswami Naidu* v. *T. P. Devasthanam*[1], to the effect that

> " There is nothing inherently impossible that an estate like the present should consist of lands wholly private, apart from the communal and other lands, which are excepted from the category of ryoti lands ".

It may be noted that the decision of Krishnaswami Nayudu, J., in *Govindaswami Naidu* v. *T. P. Devasthanam*[1] was confirmed by a Division Bench of this Court, consisting of Govinda Menon and Ramaswami, JJ., in *Govindaswami Naidu* v. *T. P. Devasthanam*[2]. My attention has also been drawn to two unreported decisions,the first by Ramachandra Iyer, J., in A. S. No. 250 of 1956. In that case, the learned Judge observed :

1. (1954) 2 M.L.J. 702. 2. (1956) 2 M.L.J. 260.

"Although all the lands in the estate are private lands, Act XXX of 1947 would apply, as the village is an estate within the meaning of that Act."

In A.S. No. 261 of 1956 and Memorandum of Cross-objections (also not reported), Basheer Ahmed Sayeed, J., observed :

"Even if the lands are *Pannai* lands, still, Act XXX of 1947 may have to be applied in order to work out rights under the Act, in case any portion of the lands is established to be ryoti lands".

Upon these facts, it appears to be abundantly clear to me that the learned Subordinate Judge misconceived the legal principles in their incidence upon the facts, in granting a declaration to the effect that the notification issued by the Government would not apply to lands in this village. The notification was perfectly proper, and ought not to be set aside. With respect to any particular holding, it will always be a question of fact, whether it is ryoti land to which the reduced rent will apply, or it is the private land of the landholder, in which case the lessee will be governed by the terms of the contract. It is represented before me that, under the latest rules, tribunals have been established for the hearing and disposal of such matters, and the conclusive finding of fact will have to be arrived at in each case, upon the merits, as between the concerned ryot and the landholder, though the Government may, of course, be a *pro forma* party to such proceedings. The appeal is accordingly allowed with costs throughout setting aside the judgment of the Courts below.

P.R.N. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

S. V. R. Natarajan Chettiar and others .. *Appellants**

v.

The State of Madras, by Collector of Ramanathapuram .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) *and Madras Estates (Reduction of Rent) Act XXX of* 1947)—*Tribunals functioning under—Power of review—Equitable estoppel—Parties inviting Court to re-hear appeal and to give fresh decision—Right to challenge re-hearing and revise decision—Decision of Estates Abolition Tribunal that village was "estate" under Madras Estates Land Act—Suit in Civil Court to challenge—Maintainbility—Madras Act XXIX of* 1956 *and Madras Act XXX of* 1956—*Scope and effect of.*

A quasi-judicial Tribunal, such as the Estates Abolition tribunal or Appellate Tribinal constituted under the Madras Estates (Abolition and Conversion) into Ryotwari) Act (XXVI of 1948) or the Madras Estate (Reduction of Rent) Act (XXX of 1947), giving a finding in the presence of the parties, as to whether a village did or did not fall within the ambit of a relevant provision of the Act, must be held to possess an inherent power to review its judgment where due cause is shown. An inherent power to review should be presumed in the case of such quasi-judicial tribunals, so as to enable it to rectify an error apparent on the face of the record or for similar adequate reasons.

Balakrishnayya v. *State of Andhra,* (1954) 67 L.W. 36 (Short Notes), distinguished.

Where a Tribunal gives a decision in an appeal without all the necessary parties on record, and all the parties invite a re-hearing of the appeal and a fresh decision on the ground that some necessary parties had not been made parties at the original hearing, and the omitted parties are then impleaded and the Tribunal disposes of the appeal by giving a contrary decision on the point in dispute, the parties who have invited a re-hearing are estopped from contending that the Tribunal had no jurisdiction to re-hear the appeal and to give a revised decision. The parties consenting to such a procedure are estopped from contending that the second decision in appeal is illegal. The consent operates as an equitable estoppel.

Section 3-A (4) (*b*) of the Madras Estates (Recuction of Rent) Act (XXX of 1947) (as amended by Madras Act XXIX of 1956) and section 7 (3) of Madras Estates (Supplementary) Act (XXX of 1956) preclude the civil Courts from entertaining a suit to challenge the decision of the tribunal acting under Madras Act XXVI of 1948 and Act XXX of 1947 upon the issue as to whether a particular inam village was an "estate" as defined by the Madras Estates Land Act.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O.S. No. 152 of 1953.

R. Kesava Ayyangar and *K. Parasaran,* for Appellants.

The Government Pleader (*K. Veeraswami*) and *R. G. Rajan,* for Respondent.

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* Appeal No. 54 of 1956.

9th November, 1959.
(8th Kartika, 1881—Saka).

The Judgment of the Court was delivered by

Anantanarayanan, J.—The appellants are plaintiffs 2 to 5 in a suit before the learned Subordinate Judge of Devakottai for a declaration that the suit village was not an Inam estate within the definition of Act XXVI of 1948 and section 3 (2) (*d*) of the Madras Estates Land Act, that Act XXX of 1947 did not apply to it, and that the relevant Notifications of the State Government applying the two Acts to the village were illegal.

The learned Subordinate Judge held that the suit was not maintainable, and he pointed out that under section 9 (4) (*c*) of Act XXVI of 1948, the decision of the Tribunal upon the issue in the suit was final, and not liable to be challenged in a Court of law. The arguments addressed before us resolved themselves into the following proposition. Though it may be indisputable that the decisions of the relevant Tribunals established under Act XXVI of 1948 and Act XXX of 1947 are conclusive upon the question that the village is an Inam estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, nevertheless, owing to the peculiar feature of this case that the Tribunal constituted under the statute first gave one decision, without the *ryots* as parties before it, that the suit village did not fall within the ambit of the definition, and subsequently gave a different decision after the *ryots* had been brought on record, the matter can now be canvassed in appeal before us. The facts here are that the appeal was once disposed of by the Tribunal, and that then the parties inclusive of the present appellants, invited a rehearing of the appeal and a decision afresh as the *ryots* had not been made parties at the original hearing. The *ryots* were then impleaded, and the Tribunal proceeded to dispose of the matter before it by holding that the suit village did fall within the category of the definition.

It is argued that this decision of the Tribunal was without jurisdiction, that the consent of the appellants could not confer jurisdiction upon the Tribunal and that, hence we must set aside the subsequent order illegally passed, in the present appeal. The argument appears to us to be quite unsustainable, upon two broad grounds. Firstly, whatever view we may take of the technical position whether a quasi-judicial Tribunal would or would not possess rights of review under the Code of Civil Procedure, the proposition certainly seems maintainable that in order to render justice, all such Tribunals, so long as they exercise judicial functions, should be held to possess inherent powers to review their judgments, where due cause is shown. Our attention has been drawn to a decision briefly reported in *Balakrishnayya* v. *State of Andhra*[1], where Balakrishna Ayyar, J., held, under somewhat similar circumstances, that the Inam Settlement Officer had no jurisdiction to reopen an enquiry made under section 9 of Act XXVI of 1948, at the request of the *ryots*. We do not think that it is necessary to dilate upon this aspect for the learned Judge was dealing with the case of a Settlement Officer making some kind of an administrative enquiry though under the Act. In the present case, we are concerned with a quasi-judicial Tribunal giving a finding in the presence of the parties, whether a particular village did or did not fall within the ambit of the relevant provision. As we have already stressed, there can be no doubt that an inherent power to review should be presumed in all such cases, as it cannot be just and expedient that such Tribunals rendering judicial decisions should be unable to rectify an error apparent on the face of the record, or to exercise powers of review for similar adequate causes.

Secondly, and on more important grounds, we think that the present appellants are totally estopped from contending that the Tribunal could not have reheard the appeals, and rendered a decision afresh. This is because the appellants invited such a rehearing and specifically consented to this procedure, in their own interests, so that the *ryots* may also be bound by the decision. We do not think it is necessary to labour the point that such consent would certainly operate as an equitable estoppel, and would prevent the appellants from contending that the second order

1. (1954) 67 L.W. 36 (Short notes).

in appeal is illegal. From an other point of view, it could even be assumed that the rehearing constituted the Tribunal into a kind of domestic forum at the invitation of the parties, and that the later decision given with the *ryots* as parties on record was an award binding upon all the parties. From this point of view, also, the appellants are not at liberty to contend that the second decision which is the final decision in the matter, should be interfered with in appeal.

Apart from all this, section 3-A (4) (*b*) of Madras Act XXIX of 1956 is very clear that the decision of the Tribunal upon such matters on appeal " shall be final and shall not be liable to be questioned in any Court of law ". We find that a precisely similar provision has been enacted in section 7 (3) of Madras Act XXX of 1956. Whatever might be the powers of this Court under Article 226 of the Constitution, so long as this Court is exercising its powers in civil appeal, its jurisdiction to interfere will certainly by affected by these valid provisions of law. Hence we hold upon all the grounds set forth above, that the dismissal of the suit by the learned Principal Subordinate Judge was proper, and that no interference is merited in appeal. The appeal accordingly fails, and is dismissed. The parties will bear their own costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

M. S. Mohamed Hussain & Sons, Hides and Skins Merchants, Gudiyatham, N. Arcot .. *Petitioner**

v.

The State of Madras, by Deputy Commercial Tax Officer, Gudiyatham .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 5 (vi)—*Madras General Sales Tax (Turnover and Assessment) Rules* (1939), *rule* 16 (2) *and* (4)—*Applicability—Hides and skins purchased by tanner and tanned outside the State in tannery not owned by him—Export of tanned goods to foreign countries—Liability to tax—Right to exemption under rule* 16 (4).

Under section 5 (vi) of the Madras General Sales Tax Act, in respect of sales of hides and skins, whether tanned or untanned, the tax liability would be only at such single point in the series of sales by successive dealers as may be prescribed. Rule 16 of the Turnover and Assessment Rules prescribes the point at which such sales should be taxed. Under rule 16 (2) the liability to tax would be attracted the moment raw hides and skins are purchased and tanned; there is no requirement that the tanning should be within the State. Where raw hides and skins are bought by a tanner in the State, the levy would have to be only under rule 16 (2) and not under rule 16 (4).

In order to render a person liable as a tanner it is not necessary that he should personally tan the goods ; nor is it necessary that he should tan them in a tannery either owned by him or in which he had an interest. The fact that they were tanned outside the State of Madras and exported to foreign countries, cannot attract rule 16 (4).

Rule 16 (4) cannot be read as a proviso to rule 16 (2) (1) ; nor can rules 16 (2) and 16 (4) be read as alternatives in respect of the same goods.

Decision in *Sri Jey Cherish and Co., Ltd.* v. *State of Madras*, T.R.C. No. 64 of 1956, (since reported in (1960) 2 M.L.J. 147), followed.

Petition under section 12-B (1) [*vide* rule 13-C (1) (*a*) of Madras General Sales Tax Act of 1939] praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 28th May, 1956 and made in Appeal No. 1388 of 1955 preferred against the order of the Commercial Tax Officer, North Arcot, Vellore, dated 3rd November, 1955, in Appeal No. 68/55-56 (Assessment No. A2-4146/53-54 (L. No. 541/53-54) on the file of the Deputy Commercial Tax Officer, Gudiyatham, dated 23rd May, 1955).

T. T. Srinivasan, for Petitioner.

The Government Pleader (*K. Veeraswami*), on behalf of the Respondent.

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* T.R.C. Nos. 226 of 1956 and 70 and 71 of 1957. 24th September, 1959.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The petitioner is a licensed tanner doing business in Gudiyatham in the North Arcot District. He was assessed to sales tax in the year 1953-54 on a turnover of Rs. 1,82,711-2-9, which comprised a sum of Rs. 88,522 representing the value of untanned hides and skins which were purchased by the assessee and tanned in Chittoor and later exported to the United Kingdom. Chittoor was a part of the Madras State till 30th September, 1953; thereafter it became part of the Andhra Pradesh. The dispute relates to the turnover in respect of the goods tanned at Chittoor after 1st October, 1953. The contention of the assessee was that the hides and skins, though purchased in the State, if tanned outside the State, woud be liable to be taxed only under the provisions of rule 16 (4) of the Turnover and Assessment Rules, that is, at the stage of sale by the first dealer after they were tanned, and that, as in the present case the tanned goods were exported to foreign countries, no tax could be levied by reason of Article 286 of the Constitution. Neither the Commercial Tax Officer nor the Appellate Tribunal accepted this contention. The Appellate Tribunal held that the hides and skins purchased while in a raw condition in this State would be liable to be assessed under rule 16 (2) irrespective of the fact whether they were tanned in this State or outside, and that rule 16 (4) would not apply to such a case. That position is contested by the assessee for the obvious reason, that if the latter rule were to apply the tanned goods, having been exported to foreign countries, would escape the levy of sales tax by reason of Article 286.

The learned advocate for the petitioner raised two contentions: (1) that, as the hides and skins were not tanned in a tannery owned by the assessee but elsewhere, it should be held that the assessee would not be liable as a tanner, and (2) that, even assuming that the assessee was liable as a tanner, assessment could be made only under the provisions of rule 16 (4), which specifically provided for a case of hides and skins tanned outside Madras State.

The case for the assessee was that he did not own a tannery and that his goods were tanned in tanneries owned by others. The Appellate Tribunal did not give a finding on that question, as, in its opinion, it would make no difference between a case where a person tanned the hides and skins in his own tannery, or where he had them tanned elsewhere. "It is admitted that the assessee obtained a license in Form No. IV for the year 1953-45 as a dealer in hides and skins whether as a tanner or otherwise". It has been found by the Appellate Tribunal that the assessee's main business was to purchase untanned hides and skins, get them tanned and sell the same. We do not consider that, in order to render a person liable as a tanner, he should personally tan the goods: nor is it necessary that he should tan them in a tannery either owned by him or in which he had an interest. Recently, we had to consider the latter part of the question in T.R.C. No. 64 of 1956[1], where we held that a person who tans in the course of his business raw hides and skins bought by him, in a tannery which was not his, would be liable to be assessed in respect of the raw hides and skins purchased as a tanner. The conclusion of the Appellate Tribunal is, therefore, correct.

On the second question, the case for the assessee was that, after 1st October, 1953, 20,622 skins were tanned at Chittoor, which since that date became part of another State. The Tribunal did not consider whether it was true that the hides and skins were tanned at Chittoor. In its opinion, such a case, even if it be true, would make no difference in the assessment, as rule 16 (2) and not 16 (4) would apply. On behalf of the assessee, it was contended that rule 16 provided for two categories of cases: (1) where hides and skins were tanned by the tanner inside the Madras State and (2) where they were tanned outside the Madras State, the first category being provided for by rule 16 (2) while the second category would be covered by Rule 16 (4). Rule 16, so far as it is relevant for the purpose of the present case, states:

1. Since reported in (1960) 2 M.L.J. 147.

"16. (1) In the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule. (2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him............

(ii) ....

(3) Sales by licensed dealers of hides or skins which have been tanned within the State shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under section 3 (3), the sale of such hides or skins shall be liable to taxation as under the next sub-rule below dealing with hides or skins tanned outside the State.

(4) Sale by licensed dealers in hides or skins which have been tanned outside the State shall be exempt from taxation except at the stage of sale by the dealer who is the first dealer not exempt from taxation under section 3 (3) who sells them within the State. The tax shall be levied from such dealer on the amount for which he sells such hides or skins."

Under section 5 (vi) of the Act, in respect of sale of hides and skins, whether tanned or untanned, the tax liability would be only at such single point in the series of sales by successive dealers as may be prescribed. Rule 16 prescribes the point at which such sales should be taxed. *Prima facie* it would appear that with rule 16 (2) providing as it does for the assessment earlier in point of time as compared with cases covered by rule 16 (4), the liability to tax would be attracted the moment raw hides and skins are purchased and tanned ; there is no requirement in the section that the tanning should be within the State. Mr. T. T. Srinivasan, the learned advocate for the assessee, contended that rule 16 (4) would apply to all cases where the raw hides and skins purchased in this State were tanned outside as otherwise an application of rule 16 (2), according to its tenor, would entail a levy of sales tax at more than one point, contrary to the provisions of section 5 (vi) of the Act. He further contended that, if in respect of all raw skins and hides a tax is levied irrespective of the fact whether it was tanned within or without the State under rule 16 (2), no exemption being provided in the Rules for goods tanned outside, in respect of which a tax was levied at the purchase point already, as in the cases contemplated by rule 16 (3), they would be exposed to a further taxation under rule 16 (4). This result could, according to him, be avoided only if the application of rule 16 (2) is restricted to the case of goods tanned within the State of Madras, rule 16 (4) being applied to cases where it was tanned outside.

The tax under the Act is on the transaction of sale. Under section 5 (vi), in regard to sale of hides and skins, whether tanned or untanned, the tax shall be levied only at such single point as may be prescribed. It is unnecessary to consider, for the purpose of the present case, whether untanned hides and skins become in law different after being tanned so as to entitle the State to tax both of them without infringing the rule as to single point levy. We shall proceed on the assumption that they are the same for the purposes of application of section 5 (vi), and that levy at one point would preclude levy at another point in the series of sales.

Rule 16 (2) prescribes the levy of the tax in respect of hides and skins. It divides them into two categories ; (1) where it is sold to a tanner in the State and (2) where it is not sold to a tanner in the State but exported outside the State. As regards the first category, the levy is at the purchase point on the tanner in the State who should have tanned the goods but that, however, is not conditioned on his having a tannery of his own or getting the goods tanned within the State. Rule 16 (3) relates to exemption from the levy of tax on goods tanned in a tannery within the State in respect of which tax had been paid. Rule 16 (4) refers to a case where hides and skins had been tanned outside the State and prescribes that the first dealer of the tanned goods who sells them within the State shall pay the tax. Having regard to the language of rule 16 (2), which comprehends all cases of purchase of untanned hides and skins, by a tanner and to the absence of any saving clause therein with respect to the cases provided for in rule 16 (4) we consider that rule 16 (4) was intended to apply only to those cases which were not covered by rule 16 (2). The appli-

cation of rule 16 (2), being at an earlier stage, would take in all cases where raw hides and skins are bought by a tanner in the State for tanning. Rule 16 (4) cannot be read as proviso to rule 16 (2) (i) nor can rule 16 (2) and 16 (4) be read as alternatives in respect of the same goods. In a case, therefore, where raw hides and skins are bought by a tanner in the State, the levy would have to be only under rule 16 (2). The rule as to single point levy would not be contravened if rule 16 (4) is held to apply only to cases not covered by rule 16 (2). We agree with the Appellate Tribunal that the assessee has been properly assessed under rule 16 (2).

The Revision Petition fails and is dismissed with costs. Advocate's fee Rs. 100.

T. R. C. No. 70 *of* 1957.—This Revision Petition relates to the assessment to sales-tax for the year 1952-53. The only question raised in this case is whether a tanner, who purchased untanned hides and skins but did not tan the same in his own factory, would be liable to be taxed. This point is covered by our decision in T.R.C. No. 64 of 1956.[1] The conclusion that the turnover in respect of such purchase is assessable is correct.

This Revision Petition fails and is dismissed.

T. R. C. No. 71 *of* 1957.—This Revision Petition relates to the assessment for the year 1954-55. The questions raised in this case are identical with those raised in T.R.C. 226 of 1956. In view of our decision in that case, this revision petition fails, and is dismissed.

P.R.N. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. William Jacks & Co., Ltd., Madras .. *Petitioner**

v.

The State of Madras, by Deputy Commercial Tax Officer, Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 3 (2) (viii)—Electrical goods—Lathes—If electrical goods—Test.

While it is neither possible nor desirable to catalogue an exhaustive list of what would constitute 'electrical goods' within the meaning of section 3 (2) (viii) of the Madras General Sales Tax Act, 1939, it is rather difficult to hold that a lathe by itself, even though driven by electrical energy, or designed primarily for use with electric energy will come within the scope of the expression 'electrical goods' to warrant the additional tax under section 3 (2) (viii) of the Act.

Petition under section 12-B (1) of Act IX of 1939 and section 25 of Act IX of 1887 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 8th February, 1957 and made in T.A.No.626 of 1956 preferred against the order of the Special Commercial Tax Officer for Appeals, Madras City, dated 29th February, 1958, in Appeal No. N. M. 38-55-56 (A-73 53-54 on the file of the Deputy Commercial Tax Officer, I Esplanade Division, Madras.)

O. T. G. Nambiar instructed by *Messrs. King and Partridge*, for the Petitioner.

G. Ramanujam, for the Government Pleader (*K. Veeraswami*), for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question for determination is whether a lathe which was driven by electrical motors constituted "electrical goods" within the meaning of section 3 (2) (viii) of the Madras General Sales Tax Act, subject to the payment of sales-tax at the higher rate. The Tribunal held that the lathe which the assessee

1. Since reported in (1960) 2 M.L.J. 147.

* T.R.C. No. 124 of 1957. 22nd December, 1959. (1st Pausa, 1881, Saka).

sold to the Railways did come within the scope of "electrical goods" and that the amount received towards the sale price of that lathe in the year of assessment was turnover subject to the payment of the additional tax under section 3 (2) (viii).

The Tribunal purported to apply the principle laid down by this Court in *William Jacks and Co., Ltd., Madras* v. *State of Madras*[1]. Apparently the tribunal overlooked what this Court stated :

"It is neither possible nor desirable for this Court to embark on a preparation of an exhaustive list of what constitute "electrical goods" within the meaning of section 3 (2) (viii) of the Act nor even is it possible to devise a formula of universal application."

It was against this background that the Tribunal had to consider the succeeding passage, where the test formulated with reference to certain specific items of goods by the then learned Chairman of the Tribunal was approved of by the Court.

".............barring a case where a machine cannot be used except with the application of electrical energy, the machine has to be regarded as non-electrical".

In that case lathes were held by the learned Chairman as non-electrical goods on the application of that test. Only in this case we are concerned with a heavier type of lathe, a special one designed for the use of Railways.

It is rather difficult to hold that a lathe, by itself, even though driven by electrical energy will come within the scope of the expression "electrical goods". We have pointed out that, in this case, the lathe in question was fitted with electrical motors, one main motor and six auxiliary motors. The Tribunal no doubt pointed out that without the use of electrical energy this lathe could not be used at all, and the Tribunal also pointed out that if the lathe was to be worked with power other than electrical power it would require changes—extensive changes. But nonethe-less the position remains, it is a lathe, which was provided with electrical motors for its use. Even a lathe designed for use normally with electric motors may not become electrical goods. Electric motors which no doubt form an integral part of the lathe in question are still there only to provide the motive power for working the lathe; the lathe itself is machinery, dependent no doubt on electricity in this case, but which could easily be designed and altered for use with other types of power. We have mentioned this only to indicate that the *prima facie* view, that a lathe even when driven by electric power is not electrical goods, is left intact despite the findings of the Tribunal, which in effect was that this was a lathe designed primarily for use with electrical energy. On a proper application of the test formulated in *William Jacks and Co., Ltd., Madras* v. *The State of Madras*[1], the lathe in question ought to have been excluded from the category of electrical goods.

The petition is allowed and the turnover in question Rs. 2,60,236-13-0 will be held liable to sales-tax only at the normal rate of 3 pies in the rupee. It is not subject to the additional rate for which section 3 (2) (viii) provides. The petitioner will be entitled to its costs. Counsel's fee Rs. 100.

R.M. *Petition allowed.*

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1. (1955) 2 M.L.J. 252 : 6 S.T.C. 301.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

C. V. Venkataraman and another .. *Appellants**

v.

C. S. Lakshmi Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Powers of Court under—Consent decree giving limited estate to a Hindu woman—Subsequent passing of the Hindu Succession Act (XXX of 1956)—If consent decree could be modified granting absolute estate.

It is no doubt true that section 14 (2) of the Hindu Succession Act, 1956, converts the limited estate of a Hindu woman into an absolute one. But that does not have the effect of making consent decrees made before the Act void merely because such decrees provide only for a limited estate. Section 151 of the Civil Procedure Code could confer no power on a Court to vary a consent decree under which a limited estate was given before the coming into force of the Hindu Succession Act, 1956, into a decree granting her an absolute right. The section wide as it is cannot grant power to any Court to grant such a substantive declaration.

Appeal against the Judgment and Order of Ganapatia Pillai, J., dated 18th April, 1958, and made in the Ordinary Original Civil Jurisdiction of this Court in Application No. 638 of 1958 in C.S. No. 106 of 1938.

C. S. Rajappa, for Appellants.

V. Sambandan Chettiar, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal must be allowed not on the merits but on the ground that the learned Judge had no jurisdiction to grant a declaration such as that which he granted to the respondent on an application purporting to be under section 151 of the Code of Civil Procedure, practically varying the consent decree in a suit, C.S. No. 106 of 1938. That decree has become final and it is not the case of the respondent that because of the passing of the Hindu Succession Act, 1956, that decree has become void. All that she says is that by reason of the provisions of that Act she has become entitled absolutely to the property in which she had under the consent decree only an estate for life. The question no doubt depends upon the construction of section 14 (2) of the Act. But so far as we are aware, there is no provision in the Code of Civil Procedure or anywhere else which warrants an application as that on which the judgment under appeal was passed. The application was for the grant of a declaration that the respondent's right and interest in certain property had become enlarged into full and absolute rights as against the limited rights granted to the respondent under the decree. Certainly the language of section 151 of the Code of Civil Procedure, wide as it is, cannot grant power to any Court to grant such a substantive declaration. While it is true that the inherent power of Courts can always be invoked to further the ends of justice, with due deference to the learned Judge there are certainly limits to such power. To further the ends of justice we cannot grant a decree on a promissory note which has become barred by limitation because the money was as a matter of fact due.

Learned counsel for the respondent appealed to us that that the widow had no remedy and she would suffer a hardship if this Court would not grant a declaration as prayed for by her. We fail to see any legal injury which she has suffered. Whether she has become entitled to an absolute estate will become relevant only after her death or as a result of any alienation made by her purporting to convey an absolute estate. If an alienation is made the controversy will be between the alienee and the reversioner. That controversy can be decided only in a regular suit. There is no

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*O.S.A. No. 61 of 1958.

16th February, 1960.
(27th Magha, 1881, Saka).

other short-cut which is recognised by any law or procedure. The appeal is, therefore, allowed but in the circumstances there will be no order as to costs.

Of course we have not dealt with the merits of the case.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Ammalu Ammal .. *Appellant**

v.

N. Samalam Iyer and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 19-*A—Applicability—Mortgage debt not ripened into decree—Scaling down at instance of one of several mortgagors—Mortgage executed by agriculturist and non-agriculturists—Right of agriculturist mortgagee—Extent of—Right to redeem entire mortgage—Usufructuary mortgage—Provision for enjoyment of usufruct in lieu of interest—Absence of provision for interest on principal amount—Applicability of* Explanation *III to section* 8*—Sections* 9-*A* (3) (11) *and* 10 (2)*—Scope of.*

Though it is undoubtedly the general law that a mortgage decree is one and indivisible, there are exceptions to this rule in special circumstances where the integrity of the mortgage has been disputed at the instance of the mortgagee himself. The Madras Agiriculturists' Relief Act is a special statute which aims at giving relief to a specified class of debtors, *viz.*, those who are agriculturists as defined in that Act. To that extent it trenches upon the general law and a mortgage decree can therefore be legally scaled down in favour of one of several judgment-debtors (who is an agriculturist) while as regards others the decree is kept intact. This general principle is not confined to the case of a mortgage decree but applies equally to a mortgage debt which has not ripened into a decree. There can be no point of distinction merely arising from the fact that the mortgage debt has not ripened into a decree.

The agriculturist mortgagor (debtor) is entitled to redeem only his or her share of the mortgage or interest therein and cannot redeem the entire mortgage by paying the scaled down amount, in view of the fact that the other executants of the mortgage are not agriculturists.

Ramaswami Ayyangar v. *Kailasa Thevar*, (1951) 1 M.L.J. 560 : (1951) S.C.J. 278 : 1951 S.C.R. 292 (S.C.), ; *Venkatavadhanulu* v. *Ramayya*, I.L.R. (1954) Mad. 158 and *Valliammai Achi* v. *Ramachandra Ayyar*, (1959) 2 M.L.J. 178, applied.

Section 8 of the Act and *Explanation III* to that section cannot apply to the case of a usufructuary mortgage, in which no special provision is made for interest on the principal amount secured, in addition to the provision for enjoyment of the usufruct intead of interest, in view of section 10 (2) of the Act. Under section 9-A (3) (11), it is only where any interest on the principal amount has been stipulated for in addition to the usufruct from the property that section 8 and *Explanation III* will apply.

Appeal against the decree of the Court of the Subordinate Judge of Ramanathapuram, at Madurai, dated 15th September, 1955 and made in O.P. No. 36 of 1953.

T. R. Srinivasan, for Appellant.

S. Sankara Kuppier and *M. Natesan*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—The appellant is the petitioner in the lower Court in an application under section 19-A of the Madras Agriculturists' Relief Act for the scaling down of a mortgage debt. The main point involved in this appeal is whether the decision of the Supreme Court in *Ramaswami Ayangar* v. *Kailasa Thevar*[1], enunciated a general principle which is applicable to facts like those of the instant case, or whether that decision is distinguishable both with reference to its facts, and upon the ground that it related to a mortgage decree, and not to a mortgage debt.

The facts necessary for an appreciation of the argument now presented are as follows : A certain Nataraja Iyer and Venkatarama Ayyar were brothers, of whom Venkatarama Ayyar had four sons and a daughter, Ammalu Ammal, the petitioner in the lower Court and the present appellant. Of these four sons of

* A.A.O. No. 39 of 1956. 24th October, 1959. (2nd Kartika, 1881—Saka).

1. (1951) 1 M.L.J. 560 : (1951) S.C.J. 278 : 1951 S.C.R, 292 (S.C.).

Venkatarama Ayyar, three are now alive, and one of them Samalam Ayyar was given away in adoption to Nataraja Iyer. These persons were living as members of an undivided Hindu family. They owned properties in three villages, and it is to be noted that in one of those villages (Sorianendal) the present appellant possessed an interest in certain specific properties through her husband, one Krishnaswami Iyer, who is dead. On 23rd August, 1930, Venkatarama Ayyar for himself and as guardian of his then minor sons including the present third respondent in the Court below, Samalam Ayyar (1st respondent in the Court below), the second respondent and the appellant joined in the execution of a usufructuary mortgage in favour of the father of respondents 4 and 5 below for a sum of Rs. 92,800 as evidenced by Exhibit A-1. The constitutent elements of the debt evidenced by this transaction were as follows (1) a sum of Rs. 57,570 being the balance of principal and interest under a simple mortgage deed, dated 27th March, 1922, for Rs. 26,000 (Exhibit A-13) executed by Nataraja Iyer, the adoptive father of Samalam Ayyar (1st respondent) and Venkatarama Ayyar. (2) Rs. 1,992 being the balance due on a promissory note, dated 9th February, 1923 (Exhibit B-48) executed by both Nataraja Iyer and Venkatarama Ayyar. (3) A sum of Rs. 8,000 left with the mortgagee for discharge of a decree debt. (4) A sum of Rs. 23,738 similarly left with the mortgagee for payment of mortgages described in Schedule C and (5) Rs. 1,500 received in cash.

It has now been found by the learned Subordinate Judge, and this finding is not in dispute before us, that the document Exhibit A-1 has been executed by four persons, of whom the appellant alone is an agriculturist entitled to the benefits of Madras Act IV of 1938. The other three executants were non-agriculturists, who are not so entitled. The learned Subordinate Judge has held, following the decision in *Ramaswami Ayyangar* v. *Kailasa Thevar*[1], that though that decision related to a mortgage decree and the present application is one by co-mortgagors under section 19 (*A*) for the scaling down of a mortgage debt, nevertheless the same principle applied, and that the appellant would be entitled, upon payment of the sum scaled down in her favour alone, to redeem her share of interest in the mortgage. She was not entitled, upon payment of the scaled down amount, to redeem the entire mortgage, treating it as an intergral debt.

It is not necessary, for our present purpose, to refer to prior decisions of this Court such as *Subramaniam Chettiar* v. *Ramachandra Reddiar*[2], in support of a view that where the amount scaled down regarding the agriculturist judgment-debtor or debtor is paid by him, the mortgage is totally redeemed, notwithstanding the fact that there may be non-agriculturist judgment-debtors having a larger liability. For it is indisputable that the earlier view of the law has been superseded by the decision of the Supreme Court in *Ramaswami Ayyangar* v. *Kailasa Thevar*[1]. It may be necessary to refer very briefly to the facts of that case, and to set forth certain pasages from that decision, in order to show that, though those facts related to a mortgage decree and not to a debt, the case did enunciate a general principle, which is applicable to all instances where certain of the debtors or judgment-debtors are non-agriculturists not entitled to the benefits of the Act. The facts of that case were that in the mortgage suit, the decree was not scaled down as against the first defendant, and his application for relief under the Act was expressly rejected. The first defendant contended that the mortgage debt was one and indivisible, and that he would still be entitled to avail himself of the benefit of the scaling down of the decree in favour of the other defendants (defendants 2 to 7), though he was held liable for the entire amount of the mortgage debt. He advanced this claim, after depositing an amount which was equal to the difference between the amount of the scaled down debt against the other defendants, and the payments actually made by those defendants. The Supreme Court observed (page 563):

"The general law undoubtedly is that a mortgage decree is one and indivisible, and exceptions to this rule are admitted in special circumstances where the integrity of the mortgage has been disrupted at the instance of the mortgagee himself; ....It is to be noted, however, that the

1. (1951) 1 M.L.J. 560 : 1951 S.C.J. 278 : (1951) S.C.R. 292 (S.C.).
2. (1946) 2 M.L.J. 429.

Madras Agriculturists' Relief Act is a special statute which aims at giving relief not to debtors in general but only a specified class of debtors, *viz.*, those who are agriculturists as defined in the Act. To this extent it trenches upon the general law........There is, therefore, nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards others the decree is kept intact".

The principle of this decision was followed and affirmed in the Full Bench decision of this Court in *Venkatavadhanulu* v. *Ramayya*[1], and in delivering the opinion of the Full Bench, Subba Rao, J., observed :

"Subsequent to the reference to the Full Bench, the Supreme Court had to deal with the same question.........It may be mentioned that the Supreme Court reversed the judgment of this Court which was the occasion for referring the question to a Full Bench".

There can thus be no doubt that the decision of the Supreme Court in *Ramaswami Ayyangar* v. *Kailsa Thevar*[2], affirmed a general principle which has been reiterated in the Full Bench decision of this Court in *Venkatavadhanulu* v. *Ramayya*[1]. There can be no point of distinction, merely arising from the fact that the present is a case of a mortage debt, and not of a debt which has ripened into a decree.

In *Valliammal Achi* v. *Ramachandra Ayyar*[3], a similar attempt was made to argue that the principle in *Ramaswami Ayangar* v. *Kailasa Thevar*[2], should be limited to certain facts, or to certain class of cases, and ought not to be accepted as a general principle. The argument was raised with regard to a case where the property was entirely owned by an agriculturist judgment-debtor, and the non-agriculturist judgment-debtor was a puisne mortgagee against whom the original mortgagee could not have proceeded personally, or brought a suit for redemption. In the judgment of Panchapekesa Ayyar, J., this argument is repelled, and the principle of the Supreme Court decision in *Ramaswami Ayyangar* v. *Kailsa Thevar*[2], followed. We have hence no doubt that the principle equally applies to the facts before us, and that the learned Subordinate Judge was right in holding that the appellant could not redeem the entire mortgage by paying the scaled down amount, but that, owing to the fact that the three other executants were non-agriculturists, she could redeem only her share or interest.

The other ground urged before us is that, in any event, the lower Court ought to have proceeded into the prior transactions which are constituent elements of the suit debt under Exhibt A-1, in particular Exhibits A-13 and B-48 already referred to, and giving relief to the appellant under *Explanation* III to section 8 of the Act. The learned Judge in the Court below rejected this argument upon the simple ground that Exhibit A-13 and B-48 were executed by non-agriculturists, and hence that those debts did not fall within the category of 'debts' as defined in Madras Act IV of 1938. Consequently, he came to the conclusion that the petitioner was not entitled to go behind the amount due under Exhibit A-1, and he proceeded to scale down this amount under section 19-A of the Madras Agriculturists' Relief Act. The procedure adopted by the learned Subordinate Judge is, in essence, correct, and he has correctly determined the liability, but the reason is fallacious ; it is not the true ground why *Explanation* III to section 8 does not apply to the present facts. Obviously, we are not concerned with the question whether Exhibits A-13 and B-48 were executed by non-agriculturists or otherwise. So long as those liabilities were taken over by the petitioner (appellant), and she was an agriculturist on the relevant dates to which the sections of the Act apply, she would be entitled to have the debts scaled down. The history of these debts, and the fact that the original debtors were non-agriculturists, would not be relevant.

But it is very clear that section 8 and *Explanation III* thereto do not apply to the facts of the present case. For this is a case of a usufructuary mortgage, in which no special provision has been made for interest on the principal amount secured, in addition to the provision of enjoyment of usufruct instead of interest. Section 10 2) of the Act specifies that :

1. I.L.R. 1954 Mad. 158.
2. (1951) 1 M.L.J. 560 : (1951) S.C.J. 278 : 1951 S.C.R. 292 (S.C.).
3. (1959) 2 M.L.J. 178.

" Nothing contained in sections 8 and 9 shall affect—(i) any mortgage of the description referred to in sub-section (1) of section 9-A except to the extent provided for in that section ".

Under sub-section (3) (ii) of section 9-A, section 8, section 9, section 12 or section 13, as the case may be, is made applicable only where,

" any interest on the principal amount secured by the mortgage or any portion thereof has been stipulated for, in addition to the usufruct from the property ".

The effect of these provsions, therefore, is that in a case of a usufructuary mortgage of the kind evidenced by Exhibit A-1, the further scaling down under *Explanation III* to section 8 cannot be resorted to. Hence, the actual liability as ascertained by the lower Court is correct, and must be confirmed.

It only remains to add that the appellant is entitled, upon payment of the scaled down amount, to redeem her interest in the hypotheca, which is an interest limited to certain portions in Item No. 170 among the properties. This clarification is necessary, as the petitioner (appellant) joined in the execution of the mortgage with reference to this specific interest, and not to some undivided share in the properties as the representative of her deceased husband. We are now told that certain other co-mortgagors have now redemeed portions of the hpotheca through certain sales. But it is unnecessary to go into this matter for the purpose of the present appeal.

The apeal accordingly fails, and is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

P. Abdul Khadar, Bangalore .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922) (as amended in 1939), section 13, Proviso—Applicability—Fictitious cash credits in the accounts of assessee in names of relations—Explanation of assessee not accepted—Rejection of accounts book results—Right of department and Tribunal to estimate income on other basis.

If there are unexplained cash credits in the accounts produced by the assessee, that by itself would certainly be a relevant factor to justify a rejection of the book results. It is not necessary in every such case that only the unexplained credits should be taken into account as income, either from disclosed or undisclosed sources ; after the rejection of the accounts, the Department and the Appellate Tribunal are free to proceed with the exercise of the further statutory right of estimating the income of the assessee, provided, of course, the estimate is on a reasonable and rational basis. Once the Department and the Tribunal find that the credit entries in the names of the relatives of the assessees are not really loans but fictitious entries to cover up income from undisclosed sources, in view of the poor circumstances in which the family had started and the fact that those relations had no such large sums of money which they could have advanced to the assessee, there is ample justification for the rejection of the book results and for the application of the Proviso to section 13 of the Income-tax Act.

It was held in the case that judged by the test of unexplained cash credits, gross profits of 10 per cent. on the turnover would be a reasonable estimate.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (VII of 1939) in R.A. No. 392 (Madras) of 1951-52 on its file in pursuance of the order of the High Court dated 20th November, 1952, in C.M.P. No. 7169 of 1952 for decision on the following questions of law, *viz.* :

(1) " Whether on the facts and in the circumstances of the case, there is any material to justify the rejection of the accounts of the Assessee by the Appellate Tribunal ; and

* Case Referred No. 52 of 1954. 19th October, 1959. (27th Asvina 1881—Saka).

(2) Whether there was any evidence to justify the finding of the Tribunal that the amount of Rs. 63,000 standing in the name of the sister was not a genuine credit and whether the Tribunal should not have recorded a finding regarding the other three items of credits in the names of the Assessee and his brother and also in the charcoal account ".

V. Sethuraman, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—These proceedings are in relation to the assessment year 1944-45. The assessee's "previous year" ended on 31st March, 1944. The assessee was then a resident of Bangalore, outside what was then British India, which constituted the taxable territories. The assessee carried on several lines of business : (1) automobile spare parts, (2) supply of butter and milk to the military authorities at Bangalore and (3) supply of live animals, beef and mutton under contracts with military authorities not only at Bangalore Cantonment but also in what was then British India. The assessee could be taxed to Indian income-tax only, of course on that portion of the income of his trading activities in the year of account which could be correlated to the then taxable territories. There is no difficulty now about his profits from his business in automobile spare parts or from his business in butter. With reference to military contracts for the supply of milk, live animals, beef and mutton to the army authorities, the assessee showed a net loss of Rs. 65,280. That was based on his plea that, while he made small profit over the supply of milk and a fairly reasonable profit over the supply of beef and live animals he incurred a heavy loss to the extent of Rs. 1,29,586 over the contract for the supply of mutton.

The Income-tax Officer declined to accept the assessee's case, that he had suffered a loss over the supply of mutton under the contracts with the army authorities. The Income-tax Officer also found cash credits in the books of the assessee, which the assessee was not able to explain. The Income-tax Officer thereupon rejected the book results and proceeded to assess the profits of the assessee. This he did by adding a round sum of Rs. 2,00,000 to the income disclosed by the assessee. After deducting Rs. 65,280 and a further inadmissible sum of Rs. 16,192 the Income-tax Officer arrived at the net figure of Rs. 1,50,912.

On appeal, the Assistant Commissioner took the view that there was no justification to add the sum of Rs. 2,00,000 to arrive at an estimate of the assessable income of the assessee for the assessment year in question. The Assistant Commissioner reduced the amount of Rs. 1,00,000.

But the assessee and the Department appealed to the Tribunal against the order of the Assistant Commissioner. On a review of the entire evidence the Tribunal held that the evidence on record justified the addition of a sum of Rs. 1,72,721. In arriving at that figure the Tribunal came to the conclusion, that the unexplained credits in the books of the assessee amounted to Rs. 1,53,000, after accepting his explanation for a credit of Rs. 10,000 in the name of his sister Sara Bibi.

On application by the Assessee to this Court under section 66 (2) of the Act, the Tribunal was directed to refer the following questions for the determination of this Court.

"(1) Whether on the facts and in the circumstances of this case, there is any material to justify the rejection of the accounts of the assessee by the Appellate Tribunal ;

(2) Whether there was any evidence to justify the finding of the Tribunal that the amount of Rs. 63,000 standing in the name of the sister was not a genuine credit and whether the Tribunal should not have recorded a finding regarding the other three items of credits in the names of the assessee and his brother and also in the charcoal account ".

The Tribunal submitted a case and, when the case came on for hearing, this Court by its order dated 9th July, 1958, directed the Tribunal to submit a further

statement of the case, virtually to answer the second question. Even the second question, by itself, referred to the omission of the Tribunal to record separate findings with reference to the credits other than those in the name of Sara Bibi. The further statment of the case has since been submitted, and the Tribunal recorded separate findings with regard to each head of credit, adhering to its original conclusion that all of them were bogus credits.

Though the unexplained credits constituted the subject-matter of the second question, it should be remembered that that is not a case of an addition of unexplained credits either as concealed income from known sources, or income from undisclosed sources to the amount disclosed by the assessee as his income. Those unexplained credits were taken into account by the authorities and subsequently by the Tribunal only to serve as a guidance for estimating the total income and to assess the assessable income of the assessee in the relevant year of account. It is only to that extent that we have to use the unexplained credits if the finding of the Tribunal prevails.

It may be easier to dispose of the second of the questions in the light of the further statement of the case submitted by the Tribunal. It may not be necessary to set out the full details discussed both in the original statement of the case and in the subsequent statement of the case. In our opinion, there was material on record on which the Tribunal could rest its conclusion, that the credits in the name of Sara Bibi, in the name of the brother and in name of the assessee himself correlated to the charcoal business, were not genuine loans borrowed from those sources but were only fictitious credit entries. The Tribunal, in our opinion, was justified in rejecting the assessee's explanation, which had not been proved. Considering the poor circumstances in which the family started, it was difficult to accept the assessee's plea, either that his sister had large moneys of her own, or that his brother Ibrahim had large moneys of his own which he could advance to the assessee. It should also be noticed that while the Income-tax Officer virtually took the same amount of Rs. 34,000 into account twice, once as having been advanced by Ibrahim, and again as having been invested by the assessee himself, that error was rectified, and only one such item has been taken into acount in arriving finally at Rs. 1,53,000 as the unexplained cash credits which the Tribunal held to be bogus credits.

The second portion of the second question does not arise for a specific answer now, in view of the specific findings recorded in the further statement of the case. Taking the whole of the second question, our answer to it is against the assessee. That answer covers all the credits.

Once again we have to point out that our answer to the second question only helps us to answer the first question. The first question in form raises only the validity of the rejection of the accounts of the assessee by the Appellate Tribunal. If there were unexplained cash credits, that, by itself ,would certainly be a relevant factor to justify a rejection of the book results. It is not necessary in every such case that only the unexplained credits should be taken into account as income, either from disclosed or undisclosed sources ; after the rejection of the accounts the Department and the Tribunal are left free to proceed with the exercise of the further statutory right of estimating the income, provided, of course ,the estimate is on a reasonable and rational basis.

The Departmental authorities accepted the assessee's figures of his gross income from his contracts (1) for the supply of beef, (2) for the supply of live animals and (3) for the supply of milk. The gross profit for the supply of beef came to Rs. 41,056; the gross profit for the supply of live animals amounted to Rs. 88,592 and that for the supply of milk amounted to Rs. 184. The Department also accepted the assessee's figure that he had expended in all a sum of Rs. 65,627 for all the items of his business. As we pointed out, while the assessee claimed that he had sustained a loss of Rs. 1,29,586 that claim was not accepted. The Tribunal agreed with the Departmental authorities in accepting the figures with reference to contracts for the supply of beef, live animals and meat. The Tribunal also apparently accepted the finding of the

Departmental authorities, that the assessee had expended in all a sum of Rs. 65,627. The Tribunal agreed with the Department that the assessee had not suffered any loss over the contracts for the supply of mutton. But the Tribunal was of the view, that the gross profits in that line of business could be estimated at 10 per cent. of the turnover. That the turnover was Rs. 4,31,355 was never in dispute. That was the figure furnished by the assessee himself.

We have set out these details only to emphasise that what the Tribunal eventually had to estimate was the profits from the contract for the supply of mutton. We have already referred to the fact, that the book results in relation to the other items of contract were accepted by the Tribunal. We have also pointed out the unexplained cash credits could cover the income, and, in this case, the income from the known sources—the several lines of business. Those unexplained cash credits themselves would to a large extent justify the rejection of the book results. Then there were also the features adverted to both by the Income-tax Officer and by the Assistant Commissioner in relation to the supply of mutton, which, in effect, the Tribunal accepted. To supply mutton under the contracts the assessee had to get animals and slaughter them. In addition, he used to buy mutton. The Income-tax Officer was of the view that the purchase price of the animals was highly inflated. No doubt the assessee referred to the retail price for mutton fixed by authorities of the Moore Market at Madras. But the Departmental authorities, and the Tribunal agreeing with them declined to take that as the guiding factor, because that related to the retail price at Madras. The assessee was a wholesaler, and from his own books it was found that he had purchased mutton at a little over five annas, far less than eight annas which at one time was the prevailing retail market rate in the Moore Market. There was certainly material on which the Tribunal could ultimately rest its conclusion, that the purchase price of animals to be slaughtered, so that the mutton could be supplied by the assessee was inflated. It may not be necessary for us now to fix with any degree of precision the quantum of such inflation. The first question that had to be determined was, whether there was justification for the rejection of the book results and for the application of the Proviso to section 13 of the Act. We had said enough to indicate that the Department, as well as the Tribunal, had material on which to reject the book results.

Though in express terms the reasonableness of the estimate ultimately made by the Tribunal is not the subject of the first question, that does arise for consideration. As we pointed out, the Tribunal ultimately estimated the profits from the contract for the supply of mutton at 10 per cent. of the gross turnover. This, the learned counsel for the assessee challenged and he submitted that the Tribunal had no real basis in the material on record for this estimate. The learned counsel pointed out that in the proceedings before the Assistant Commissioner the Department's representative himself conceded that in a comparable case the gross profits of the contract for the supply of mutton amounted only to 0.33 per cent. No doubt that was a factor which the assessee could urge the Tribunal to take into account. The Tribunal, also took into account the unexplained cash credits to the extent of Rs. 1,53,000. As we pointed out, since the assessee's book results with reference to the other items of business were accepted, the Tribunal could not be deemed to have gone wrong in taking the view that the unexplained credits should really be traceable to the profits that the assessee derived principally from the supply of mutton. Learned counsel for the assessee next urged that, while the unexplained cash credits amounted only to Rs. 1,53,000 the addition the Tribunal sustained, would amount to a little over Rs. 1,72,000. That may not be the correct way of looking at things. Rs. 1,72,000 was arrived at after estimating the profits of the assessee from the contract for the supply of mutton at 10 per cent. of the gross turnover. The turnover, as we said, was Rs. 4,31,355. Ten per cent. of that would amount to Rs. 43,135. That was the profit that he was held to have made and the claim of the assessee that he had incurred a loss of over Rs. 65,000 in all had to be rejected. In arriving at an addition of Rs. 1,72,000 it was only a question of arithmetical calculation, the basic features being rejection of the assessee's claim that he had incurred a loss

and the finding that on the contracts for the supply of mutton gross profits of 10 per cent. of the turnover would be a reasonable estimate. Judged by the test of the unexplained cash credits, we cannot say that an estimate of 10 per cent. was not reasonable in the circumstances of the case.

Thus the net position would be that the assessee's gross profits would be as follows: beef Rs. 41,056, live animals Rs. 88,592, meat Rs. 43,135, milk Rs. 184. From out of this gross profits the assessee would be entitled to deduct an expenditure of Rs. 65,627. The balance so assessed is his income. On only a portion of that income was the assessee liable to Income-tax under the Indian Income-tax Act. The apportionment itself is not in dispute.

We answer the first question in the affirmative and against the assessee. As the assessee has failed he will pay the costs of this reference. Counsel's fee Rs. 250.

P.R.N. — *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE RAJAGOPALA AYYANGAR.

The Salem Shevapet Sri Venkateswara Bank, Ltd., Salem by its Secretary .. *Petitioner**

v.

K. K. Krishnan and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), section 41 (1)—Scope—Termination of services for misconduct—Enquiry by employer and evidence essential—Non-compliance with the essentials—Jurisdiction of the appellate authority.

The protection afforded by section 41 (1) of the Madras Shops and Establishments Act to the servant are (1) an insistence on the employer holding an enquiry into the misconduct (2) have statisfactory evidence recorded at that enquiry held in his presence before he can be dismissed from service for misconduct.

The enquiry set out in the section is as essential a pre-requisite as the presence of misconduct, to a valid order of dismissal.

Under section 41 (1) of the Act it is the employer that is vested with jurisdiction to terminate the services of a person employed subject to the fulfilment of the statutory conditions.

The appellate authority under section 41 (1) must be held to have juridsdiction to enquire into whether the statutory conditions subject to which alone a servant could be dismissed have been complied with. When it finds that those conditions have not been so complied with it would be his duty to allow the appeal preferred by the employee. The section was not intended to convert the appellate authority into a forum where an original enquiry into the misconduct of the employee justifying his dismissal could be conducted so as practically to deprive the employee of the statutory protection afforded by section 41 (1) of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records relating to the order of the Additional Commissioner for Workmen's Compensation, Madras in M.S.E Case No. 219 of 1955 dated 8th January, 1957 and to quash the said order.

M. K. Nambiar and *O. K. Ramalingam*, for Petitioner.

A. Ramachandran for *Messrs. Row and Reddy*, for Respondent.

The Additional Government Pleader (*M. M. Ismail*), on behalf of the State

The Court made the following

ORDER.—One Krishnan who is the first respondent in this petition was a clerk in the Salem Shevapet Sri Venkateswara Bank, Ltd., who are the petitioners in this petition for the issue of a writ of *certiorari*. The facts which have given rise to the petition are briefly these. While Krishnan was working as clerk in the petitioner

* W.P. No. 376 of 1957. 19th August, 1959.

Bank he sent a letter on 8th August, 1955, to the Secretary of the Bank requesting that he may be granted leave for that day and the next. Leave was not granted and on 11th August, 1955, the Secretary of the Bank directed the clerk to offer an explanation as to why he had absented himself from duty on 8th August, 1955 without previously obtaining leave. Besides this there were several charges made against him and this was sent in a formal communication dated 22nd August, 1955. In the meantime the clerk was kept under suspension. An explanation was furnished by the employee which the Secretary held to be unsatisfactory and it is common ground that without any further enquiry the Secretary passed an order on 1st September, 1955 dismissing the employee from service.

The order of dismissal recited that the employee was guilty of various acts of misconduct. On 7th September, 1955, the clerk filed two appeals one to the Additional Commissioner for Workmen's compensation, Madras under section 41 (2) of the Madras Shops and Establishments Act, 1947, (XXXVI of 1947) and another to the Board of Directors of the Bank. On 29th September, 1955, the employee was directed to appear before the Board and he did so. On that day he was asked by the Board to elect between the two appeals the one to themselves and the other to the Additional Commissioner for Workmen's Compensation. The employee refused to elect and stated that he would have the benefit of both the appeals. Subsequently on 10th October, 1955, by a communication addressed by the Secretary, the employee was informed that his *appeal would be heard* on 14th October, 1955 and he was required to appear at that time with his witnesses. On 13th October, 1955, the petitioner sent a reply. In this he drew the attention of the Board to the counter filed by the Bank to his appeal before the Additional Commissioner for Workmen's Compensation and enquired whether evidence would be recorded on the charges framed against him with an opportunity to him to cross-examine those witnesses and also wanted copies of records regarding the enquiry. He also added :

"From the written statement filed by you before the Commissioner of Labour I have no belief that I will get justice at the hands of the Board of Directors".

This was not replied to by the Bank but on the 14th of October, 1955, the order of dismissal was confirmed, the minutes of the meeting of the Board recording that the clerk did not attend the meeting and give evidence and that from the deposition of the Secretary the charges framed against the clerk were held to have been proved. Thereafter the appeal before the Additional Commissioner for Workmen's Compensation was heard and that Officer passed an order on 8th January, 1957, allowing the appeal and setting aside the order of the Board dismissing the clerk from service. It is the legality of this order of the Additional Commissioner for Workmen's Compensation dated 8th January, 1957 that is challenged in these proceedings.

Three points were urged by Mr. Nambiar learned counsel who appeared for the employer petitioner : (1) that the appeal by the employee to the Additional Commissioner for Workmen's Compensation was incompetent because the order of the Secretary effecting the dismissal was not final but was subject to confirmation by the Board of Directors and that till such confirmation was obtained there was no definitive order of dismissal which could be the subject-matter of an appeal, under section 41 (2) of the Shops and Establishments Act. For this purpose learned counsel relied on Articles 67 and 86 of the Articles of Association of the Bank which ran in these terms :—

Article 67.—"In anticipation of the sanction of the Executive Committee, the Secretary has the power to appoint, to grant leave, to punish and to dismiss the employees. The appeal time is one month from the date of the order of the Secretary".

Article 86.—"The Secretary has the power to grant leave to the bank employee as well as to deduct their pay for the days of absence without permission, to fine the employees not exceeding Re. 1 for every mistake of disobedience and to suspend subject to the confirmation of the Executive Committee and to appoint another in that place. But to dismiss an employee, the sanction of the Executive Committee is necessary."

The same point was urged before the Appellate authority but was rejected for the reason that the order of dismissal passed by the Secretary and which was the

subject-matter of the appeal before him nowhere indicated that it was not final nor did it recite that it was in anticipation of sanction by the Board of Directors. The Additional Commissioner also pointed out that the wages of the employee were paid only up to the end of 31st August, 1955, which went to show that the Bank treated the employee as in service only up to the date of the dismissal order issued by the Secretary which also showed that it did not proceed on the basis of its being effective only when confirmed by the Board. Besides there had been a previous resolution of the Board on 28th August, 1955 which had authorised the Secretary "to take such action as he deemed fit" against the clerk, that it was in pursuance of this authorisation that the Secretary had taken action against the respondent and that it was possibly for this reason that the order of dismissal passed by the Secretary was treated as a definitive order entitling the employee to wages only up to that date. The reasons given by the Additional Commissioner are sound and this point has, therefore, no substance.

The second matter that was urged was that since the employee had filed an appeal to the Board of Directors under the Articles of the Bank, the order of the Secretary even if it was once final, became re-opened with the result that it could be the subject-matter of an appeal entertainable by the Additional Commissioner under section 41 (2) of the Madras Shops and Establishments Act, 1947. This point has also in my opinion no substance and deserves to be rejected. The theory that by reason of filing an appeal a definitive order of an inferior or original authority becomes reopened is not in my opinion applicable to such proceedings as are now in question in this petition. This apart the Board of Directors on 28th September, 1955, proceeded on the basis that it was open to the employee to opt for either remedy to prosecute his appeal before the Board of Directors or to proceed with his appeal before the Additional Commissioner. This certainly could be only on the footing that the appeal before the Additional Commissioner was one properly filed and properly entertained and was a competent appeal pending on that date. When required to elect between the two remedies the employee had stated that he would prefer to avail himself of both the remedies, which certainly meant that he did not intend to drop or withdraw his appeal before the Additional Commissioner. If the appeal before the Additional Commissioner had been validly filed and entertained, and was pending on 28th September, 1955, I am unable to see any principle by which the Additional Commissioner would become *functus officio* by reason of the employee refusing to drop his appeal to the Board. No doubt if the employee obtained at the hands of the Board such relief as he thought he was entitled to, he might have withdrawn his appeal before the Additional Commissioner, but such withdrawal would be of an appeal which was in force on that date, the withdrawal being because of the fact that he had already obtained such relief as he would have got by the successful prosecution of that appeal. Mr. Nambiar, however, urged that by offering the employee the option to choose either of the remedies, it could not be taken that the Bank had agreed to waive their objection to the jurisdiction of the Additional Commissioner for the reason he had simultaneously filed an appeal to the Board which was also pending at the same time as the appeal before the Additional Comissioner. If Mr. Nambiar is right in this contention, and I am satisfied that he is not, by parity of reasoning the appeal before the Board must be held to be incompetent because of the pendency of the appeal before the Additional Commissioner and this would show how untenable the argument of the learned counsel is. In my judgment the Additional Commissioner very properly overruled this objection to his jurisdiction to decide the appeal.

The last point that was urged in support of the petition was that the Additional Commissioner erred in not enquiring into the merits of the misconduct charged against the employee and in allowing the appeal and setting aside the order of dismissal for the sole reason that no enquiry had been held by the management prior to the dismissal. In this connection learned counsel referred me to the analogy of cases under the Industrial Disputes Act wherein it has been held that if permission is not obtained to the dismissal of an employee during the pendency of an industrial

dispute and the propriety of the order of the employer comes up before the Industrial Tribunal, the latter is bound to enquire into the merits of the complaint against the workman before setting aside the order of the employer. I am unable to see any analogy between the two cases. Section 41 (1) of the Madras Shops and Establishments Act enacts :

> "No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose."

This section enacts a rule of law which is a variation from the Common law contractual right of a master to dispense with the services of his servant. In the case of persons who are under the coverage of the statute it affords the protection of a security of tenure by restricting the right of the employer to dismiss or discharge the employee. The provision, it would be seen has two limbs. Under the first, the master or the employer is entitled to dispense with the services of a servant for *reasonable cause* but after giving such person *at least* one month's notice.

Though at Common law the right of an employer to discharge a servant on giving him notice or wages in lieu is unfettered, the statute effects a change in this right and requires in addition to notice for the contractual period, that there should be reasonable cause for the discharge. What would constitute reasonable cause, whether the employee should have notice of that reasonable cause with an opportunity to canvass it are matters that do not arise in this petition and which would preferably be considered when they become material. What is really relevant is the second limb of the section where no notice or wages in lieu of notice is given, and the discharge or dismissal is effected for misconduct on the part of the servant. In such cases the statute enacts a greater degree of protection to the employee, and insists on the charge of misconduct being *held to be proved* by satisfactory evidence recorded at an inquiry held for the purpose.

Here again it would help the appreciation of the legal position, if the variation from the Common law right of the master were noticed. Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged is good cause for dismissal at Common law. The Common law, however, does not insist on an enquiry before a dismissal and the master is entitled to justify the dismissal by proving the misconduct, when the servant questions the legality of the dismisssal, say by an action for wages for periods subsequent to the dismissal. The protection afforded to the servant by the statute are thus (1) an insistence on the employer holding an enquiry into the misconduct, (2) have satisfactory evidence recorded at that enquiry held in his presence before he can be dismissed from service for misconduct. It would, therefore, appear as if the enquiry of the sort set out in the statute is as essential a pre-requisite to a valid order of dismissal, as the presence of misconduct which is required by the Common law as well on the part of the employee.

It is in the light and context of these elements of protection granted to the servant that the terms of section 41 (2) have to be understood. Under section 41 (2) the grounds of appeal are two : (1) that there was no reasonable cause for dispensing with the services and (2) that the employee (appellant) had not been guilty of misconduct as held by the employer. It would be seen that these two terms are related to the two limbs of sub-section (1) of section 41 to which I have already referred. I will refrain from dealing with the first of the grounds of appeal namely, that there was no reasonable cause for dispensing with the services which applies to cases where notice of at least one month or wages in lieu of notice is given as that is not relevant to the present case and confine myself only to the other ground, namely : "the appellant had not been guilty of misconduct" as held by the employer. The Appellate authority under section 41 (2) must be held to have jurisdiction to enquire whether the statutory conditions subject to which alone a servant could be dismissed have been complied with. When it finds that this is lacking, I consider that it would be the

duty of that authority to allow the appeal. It must be remembered that section 41 (2) of the Act enacts that it is the misconduct which has been *held by the employer* to have been established that is made the subject-matter of enquiry by the appellate authority. That "holding" can only arise on the terms of section 41 (1) after an inquiry at which satisfactory evidence has been recorded. When those conditions are wanting the terms of section 41 (1) would not be satisfied.

Besides, under section 41 (1) it is the employer that is vested with jurisdiction to terminate the services of a person employed, subject to the fufilment of the statutory conditions and to hold that the appellate authority can conduct as it were an original inquiry into the charge of misconduct would not be in accordance with the scheme of section 41 and would, nullify the protection afforded by the statute and place the servant in the same position as if the conditions laid down by the second limb of section 41 (1) were not there. It is only when at an original enquiry held by the employer, that the charges are held by him to have been proved that the appellate authority is directed to enquire as to whether the charge of misconduct could be taken to have been properly established. In my opinion section 41 (2) was not intended to convert the appellate authority into a forum where an original enquiry into the misconduct of the employee justifying his dismissal could be conducted so as practically to deprive the servant of any right beyond what he was entitled to at common law. I have, therefore, no hesitation in rejecting this point urged by the learned counsel for the petitioner.

The result is that this petition fails and is dismissed. The rule *nisi* will be discharged.

V.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

R. Ponnuswami Gramani .. *Petitioner**

v.

Collector of Chingleput and others .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), section 9—Assessment of turnover of a dissolved firm—Liability of the partners after dissolution for the tax.

It is no doubt true that unlike the Income-tax Act, the Madras General Sales Tax Act, 1939, or the rules framed thereunder do not contain a separate provision for assessing the tunrover of a dissolved firm which was a " dealer " as defined by the Act till its dissolution. But on that score the liability of the partners of the dissolved firm to pay the tax due by the firm cannot be avoided. Such arrears could be recovered from the partners even independently of their being in possession of the assets of the dissolved firm.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition prohibiting the respondents 1 to 3 from attaching and selling the petitioner's properties or taking any other proceedings against the petitioner for recovery of the arrears of sales tax amounting to Rs. 9405.25 nP. levied on the firm of 'Ponnuswamy Gramany and Kurshidulla Co., in pursuance of the notice of the 2nd respondent, dated 6th January, 1959.

V. Balasubramaniam, for Petitioner.

R. G. Rajan and the Additional Government Pleader (*M. M. Ismail*), for the Respondents.

The Court made the following

ORDER.—On 15th August, 1950, Ponnuswami Gramani, the Petitioner entered into a partnership with one Kurshidulla Sahib for carrying on a business in hides and

* W.P. No. 8 of 1959. 23rd October, 1959.

skins. The name of the firm was Ponnuswami Gramani and Kurshidulla Company and its place of business was in Periamet, Madras. By an instrument, dated 29th January, 1952, the partnership was dissolved with effect from 15th January, 1952. Notice of the dissolution was given to the Registrar of Firms, Madras and also by advertisement in a Tamil newspaper. By the terms of the instrument of dissolution, Ponnuswami Gramani relinquished all his interests in the partnership in favour of Kurshidulla Sahib who took over all its assets and liabilities. Kurshidulla continued to do business in the same commodities.

On 31st March, 1953, thatis to say, long after the deed of dissolution had been executed, the Deputy Commercial Tax Officer, Moore Market Division, Madras, assessed the firm of Ponnuswami Gramani and Kurshidulla Company to sales tax for the year 1950-51 in a sum of Rs. 2,551-8-5. Similarly on 26th March, 1955, he assessed the firm to sales tax for the year 1951-52 in a sum of Rs. 7,053-11-5. The petitioner represented to the Sales Tax Authorities that in view of the fact that the firm had been dissolved in 1952 sales-tax should be assessed on and collected only from Kurshidulla Sahib. His objections, however, were overruled, and, the appeal he preferred to the Specal Commercial Tax Officer was dismissed.

On 6th January, 1959, the Special Deputy Tahsildar for sales tax collections served a notice on the petitioner threatening to attach and sell his properties in case he failed to pay the arrears claimed within three days thereafter. The Village Munsif of Puzhal also served a notice on the petitioner the same day under the Madras Revenue Recovery Act, 1864. The petitioner has, therefore, come to this Court for the issue of an appropriate writ to prohibit the Collector of Chingleput, the Special Deputy Tahsildar and the Village Munsif from taking any steps to recover the amounts claimed from him. It should be added that out of the amounts claimed by the department the petitioner has paid in all Rs. 1,200 out of which Rs. 1,000 was paid during the pendency of these writ proceedings and without prejudice to his contentions.

Mr. Balasubramanyam, the learned advocate for the petitioner, argued the matter very elaborately and very carefully. His contentions may be summarised as follows :—

(1) The Madras General Sales Tax Act treats a firm as a taxable entity. Section 3 of the Act declares that every dealer shall pay for each year a tax on his total turnover in the manner thereinafter laid down. The *Explanation* to clause (*b*) of section 2 makes it clear that a firm which carries on business is a dealer for the purposes of the Act. Rules 19 and 20 of the Madras General Sales Tax Rules emphasise the point. For certain purposes the Partnership Act itself recognises a firm as a distinct entity and it is this concept which has been carried over into the General Sales Tax Act. This has been explained by Subba Rao, J., in *Public Prosecutor* v. *Jacob Nadar*[1]. The head-note to that case runs as follows :—

> " Under the Madras General Sales-tax Act, 1939, a firm is a person and for purposes of assessment it is treated as one entity. In default of payment pursuant to a notice under section 15 (*b*) the firm is also liable to be prosecuted. Rule 19 of the Madras General Sales Tax Rules, 1939, does not override the provisions of the Act ".

(2) When a firm is dissolved—as a firm in the present case has been dissolved —it ceases to exist as a taxable entity. Even under the Indian Partnership Act a firm is recognised as an entity distinct from the persons constituting it. But that will be so long as the firm exists and continues to carry on business. If it ceases to exist as an entity no assessment can be made upon it, and, if no assessment can be made upon it, it follows *a fortiori* that no demand can be made upon it. By way of analogy reference was made to *Ellis E. Reid* v. *Commissioner of Income-tax Bombay*[2]. In that case a person was served with a notice under section 22 (2) of the the Income-tax Act. He failed to make a return and died after the expiration of the period specified in the notice. The Court held that an assessment could not be made on him under section 23 (4) of the Act after his death. On page 104 the learned Chief Justice observed :

1. (1951) 1 M.L.J. 511.
2. (1931) 5 I.T.C. 100.

"There appears to be nothing in the charging section to suggest that a man who has once become liable to tax can avoid payment by dying, and I must confess that I do not myself see any intelligible reasons why when tax is once charged upon a subject in respect of a period during which he was alive and enjoying the benefits of the proceeds of taxation, he should escape liability by dying before the tax has been assessed or paid. But one has to look at the rest of the Act to see whether there are any appropriate provisions for collecting tax from the estate of a deceased person..........

These are, I think, the only material provisions of the Act. It is to be noticed that there is throughout the Act no reference to the decease of a person on whom the tax has been originally charged and it is very difficult to suppose the omission to have been unintentional. It must have been present to the mind of the Legislature that whatever privileges the payment of income-tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and in practically every case, before the last instalment has been collected, and the Legislature has not chosen to make any provisions expressly dealing with assessment of or recovering payment from the estate of a deceased person. In order that the Government may succeed and the assessment made in this case may be held legal, I think, one must do a certain amount of violence to the language of section 23 (4) ; I think one must either do a certain amount of violence—I should say a considerable amount of violence—to the language of section 27, or else hold that the privilege conferred on a living person assessed under section 23 (4) of getting the assessment set aside is not to be enjoyed by the estate of a deceased person—a distinction for which I can see no logical reason. One must also construe section 29 so as to give to the word " assessee " one meaning in one place and another meaning in another place.

In my judgment, in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the Legislature intends to assess the estate of a deceased person to tax charged on the deceased in his life-time the Legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the statute ".

And, adopting the language of the learned Chief Justice of the Bombay High Court, Mr. Balasubramanyam argued that there are no appropriate words in the General Sales Tax Act to enable the tax to be collected from the partners of a firm after the firm itself has been dissolved. He also referred to the decision in *Veerappan Chettiar* v. *Commissioner of Income-tax*[1], in which it was held that section 44 of the Income-tax Act does not authorise the Income-tax Officers to levy a penalty on a registered firm which has ceased to be in existence on the date the penalty is imposed, even if the notice relating to the penalty proceedings had been issued in the course of the assessment proceedings before the firm was dissolved.

(3) It is not open to the Department to call in aid the rule that even after the dissolution of a firm the members of the erstwhile firm continue to be liable for the debts of the firm, because the liability to pay tax in the present case had not become a debt at the time the firm was dissolved. It was held in *Re Pratt : Ex parte Inland Revenue Commissioners* v. *Phillips*,[2] that the principle

" that where a tax has to be assessed, it does not become either due or payable till at least an assessment is made, is one of general application."

That principle was adopted in *Recols (India) Ltd.*, In re,[3] by a Bench of the Calcutta High Court. In the present case, therefore, there was no debt properly so-called payable on account of General Sales Tax by the firm to the Government.

(4) The Income-tax Act contains clear and express provisions to meet contingencies of this kind. *Vide* section 44 which enacts that where any business carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution, a partner of the firm shall be jointly and severally liable to assessment under Chapter IV.

(5) No such provision has been made in the General Sales Tax Act. A lacuna clearly exists, and, as explained in *Ellis E. Reid* v. *Commissioner of Income-tax, Bombay*[4] in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax.

1. (1957) 2 M.L.J. 286 : 32 I.T.R. 411.
2. (1950) 2 All E.R. 540 at 548.
3. (1952) 4 S.T.C. 271.
4. (1931) 5 I.T.C. 100.

A Bench of the Allahabad High Court has ruled directly on this point. In *Jagat Behari Tandon* v. *Sales Tax Officer, Etawah*[1], it was held that an assessment cannot be made under the U.P. Sales Tax Act, 1948, on a firm after it has been dissolved and has discontinued business on the ground that the firm as a unit of assessment has ceased to exist. It may be mentioned that the relevant provisions of the U.P. Sales Tax Act are the same as those of the Madras General Sales tax Act. The Court observed :

" It is no doubt true that under the Indian Partnership Act, 1932, a firm has no legal existence, but this Court has held in *Shri Hira Lal Barman* v. *The Sub-Divisional Officer, Hathras and another*[2], that under the Sales Tax Act, as under the Income-tax Act a firm is a separate unit of assessment and to this extent it is distinguishable from its partners. There appears to be no good reason why a firm which carried on business in the accounting year should escape payment of sales tax by dissolution before it has been assessed, and this aspect of the matter clearly influenced the learned Judge. The question is 'however whether the Act makes provision for the assessment and collection of tax in such circumstances?' In our opinion it does not ".

On behalf of the Government it was explained that a firm is recognised as an entity only as a matter of convenience and for certain limited purposes. Such recognition does not affect to any extent : much less wipe out the liability of the members of the firm under the Partnership Act. A firm is only a collective name for a group of individuals. To say that because the firm has been dissolved the entity which could have been taxed has ceased to exist and that therefore there is no entity which could be taxed is misleading, because it overlooks the fact that a firm as such has no juristic existence. Besides even after the dissolution of a firm, the individuals who constituted the firm continue to be liable in respect of its obligation. The assessment in this case, though nominally in the name of the firm, was in substance on the persons composing it. By dissolving a firm the partners thereof cannot shed the obligations that attached to them before such dissolution. Section 47 of the Partnership Act expressly provides that even after the dissolution of a firm the authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm. Now, ascertaining the liability of the firm and making arrangements to settle them is a necessary part of the various processes involved in winding up the firm. The liability to pay sales tax having already accrued, its quantification and payment can properly be regarded as part of the process of winding up of the firm. Kurshidulla Sahib who was a partner of the firm had the requisite authority to represent the petitioner for this purpose. The tax was, therefore, properly charged and the amount claimed by the Department is due.

In *Dy. Commissioner of Taxes* v. *Bakthavatsalam Naidu*,[3] a Bench of the Andhra High Court ruled:

" Under the Madras General Sales Tax Act a firm is a ' dealer ' and therefore in respect of a transaction done by a firm, which was in existence during the assessment year but was dissolved subsequently, it is the firm that is to be assessed to tax and not any of its partners in their individual capacity ".

Another decisions that was cited before me is that reported in *R. D. Fernandes, In re*[4]. In that case it appears that a firm dealing in tiles was dissolved in October, 1951. Subsequent to that date the firm was assessed to sales tax and a notice was issued to it to pay the amount. The notice was served on both the partners of the dissolved firm. The tax, not having been paid, one of the partners was prosecuted. He was convicted by the Magistrate and he came up in revision to this Court. The conviction was confirmed and the revision petition dismissed. Ramaswami, J., who dealt with the matter observed:

" This State debt will be recoverable from and out of the partnership assets even after dissolution and in the hands of the partners or otherwise."

In Writ Petition No. 397 of 1954, Rajagopalan, J., went into the matter more fully. The relvant facts there were as follows : Manickam Chettiar and Lakshmayya

1. (1957) 8 S.T.C. 459.
2. Writ Petition No. 1025 of 1954., decided on 7th February, 1956.
3. (1955) An. W.R. 851 : 6 S.T.C. 657.
4. (1957) 8 S.T.C. 365.

Ammal were partners of a firm which traded under the name of Starch Manufacturing Company, Salem. The firm was dissolved on 4th August, 1949. Thereafter, Manickam Chettiar continued the business. The firm was assessed to sales tax for the year 1948-49. It was assessed to sales tax for that portion of the year 1949-50 during which it was in existence. The amount of the assessment not having been paid, notices of demand were issued to Manickam Chettiar who was described as "Sri P. Manickam Chetty, Starch Manufacturing Co., Shevapet, Salem." The notices were served on him. As the amount was not paid the revenue authorities threatened to proceed against the petitioner under the Revenue Recovery Act. He, therefore, came to this Court and prayed for the issue of an appropriate writ to prohibit the concerned authorities from doing so. In dismissing the petition, Rajagopalan, J., observed :

"It is no doubt true that neither the Act nor the Rules framed thereunder make any separate provision for assessing the turnover of the dissolved firm or for the recovery of the taxes due by a dissolved firm, which was a dealer as defined by section 2 (*b*) of the Act up to the date of its dissolution. To that extent it differs from the Income-tax Act. That, however, in my opinion is not enough to sustain the contention of the learned counsel for the petitioner that the partners of the dissolved firm are not in any way liable for the sales-tax due by the dissolved firm.........

Though there is no specific provision in the Act or the Rules thereunder for collection of arrears of tax due from a dissolved firm, the liability of the petitioner as a partner of the dissolevd firm to pay whatever was lawfully due by the partnership of which he was a partner can be enforced, if it is establised that there was default within the meaning of section 10. The arrears could be recovered from him independent of his possession of any of the assets of the dissolved partnership, as if the arrears of tax constituted an arrear of land revenue".

The appeal from this decision, W A. No. 132 of 1955, was dismissed *in limine*. Learned counsel for the petitioner tried to explain away this case. But, I think it is clearly in point. I prefer to follow the views expressed in this Court, which means that this writ petition must fail. It is, therefore, dismissed with costs. Advocate's fee Rs. 150.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Kanchi Kamakoti Mutt, Kumbakonam, by Agent R. Seshaiya Sastrigal .. *Petitioner**

v.

A. Alagu Ambalam (deceased) and others .. *Respondents*

Madras Tenants and Ryots Protection Act (XXIV of 1949), section 4—Stay of suits under—When could be invoked and by whom—Suit against a tenant whose tenancy has expired—If could apply for stay—Tenant denying title of landlord—Suit if could be stayed.

It is no doubt true that the Madras Tenants and Ryots Protection Act, 1949, does not define the word 'tenant' and the popular meaning of the term would relate to persons whose tenancy is subsisting. But in law the meaning of the word 'tenant' has to be ascertained from the context of the provisions of the particular statute and the class of persons who are intended to be protected under it.

Normally suits in ejectment would be filed only against tenants whose tenancy has been determined and the necessity for protection against eviction arises only in such cases. Hence the provisions of section 4 of the Madras Tenants and Ryots Protection Act, 1949, could be invoked even by tenants whose tenancy has expired and against whom a suit in ejectment has been filed. The very object of the Act will be rendered nugatory if the section is confined only to cases of tenants whose tenancy is subsisting.

But in order to attract the application of section 4 (1) of the Act there should be the relationship of landlord and tenant between the parties to the suit. Where a tenant against whom the suit is filed denies the title of the landlord or sets up rights of permanent tenancy or occupancy rights, it tantamounts to a repudiation of the relationship of landlord and tenant and this entails forfeiture of the tenancy. In the absence of any specific definition in the Act of a tenant as including a person who has

* C.R.P. Nos. 1749 to 1752 of 1956. 6th August, 1958.

incurred a forfeiture of his tenancy, such a person cannot invoke section 4 of the Act and the suit against him can be tried by the civil Court and need not be stayed. There is nothing in the Act to warrant the extension of its benefits to cases where the tenant has incurred forfeiture of the lease.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Distict Munsif of Manamadurai, dated 23rd August, 1956 and made in I.A. No. 538 of 1956 in O.S. No. 63 of 1955, I.A. No. 539 of 1956 in O.S. No. 64 of 1955, I.A. No. 540 of 1956 in O.S. No. 67 of 1955 and I.A. No. 541 of 1956 in O.S. No. 68 of 1955 respectively.

K. S. Ramamurthi, *K. Valdeeswaran* and *K. Venkataraman*, for Petitioner.

T. R. Srinivasan (Amicus Curiae) for Respondent.

The Court delivered the following

JUDGMENT.—These revision petitions arise out of orders passed by the District Munsif of Manamadurai in I.A. Nos. 538 to 541 of 1956 granting stay of suits, O.S. Nos. 63, 64, 67 and 68 of 1955 under the Madras Tenants and Ryots Protection Act XXIV of 1949. The plaintiff is the petitioner in these petitions. He filed the above-mentioned four suits aginst the respective defendants for recovery of possession of the properties together with mesne profits. The plaintiff stated that the lands were situate in the inam village of Pulavacheri in iruvaram as sarvamanyam to the plaintiff. That inam was recognised and confirmed by the British Government. According to the plaintiff half of the lands in the village have been set apart and treated as pannai private lands and that in July, 1953, the defendants got an oral lease of the lands set out in the schedule to the various plaints from the plaintiff's Peshkar for cultivation for fasli 1363. But after getting into possession they began to deny the title of the landlord. He had, therefore, to institute against the tenants O.S. No. 12 of 1954 on the file of the District Munsif's Court, Manamadurai, for damages and other reliefs. Thereafter, *i.e.*, by 30th June, 1954, the time mentioned in the leases in favour of the various defendants also expired. In those circumstances the plaintiff prayed for ejectment of the defendants and for a decree for mesne profits. The defendants contested the claim of the plaintiff. They denied the fact that the plaintiff had rights and stated that the inam grant could not bind the pre-existing kudiwaram rights which they claimed in the lands. They also denied that the lands were pannai lands and that they were ever under the enjoyment of the landlord either by direct cultivation or by leasing out. They further denied that they ever took the property on lease from the plaintiff and claimed that the land belonged to them in kudiwaram right ancestrally and absolutely. The written statements disclose a complete denial of the landlord's title to lease the properties and to eject the tenants. In paragraph 12 of the written statement the defendants stated that they were protected by the Madras Tenants and Ryots Protection Act. While the suits were pending the respective defendants in the various suits filed applications praying for stay of the suits under the Madras Tenants and Ryots Protection Act, XXIV of 1949. The learned District Munsif held that although the substantial defences in the suit were the assertion of kudiwaram right in the lands and want of jurisdiction of the civil Court, there was also a prayer for stay of the suits under the Madras Act XXIV of 1949 and that therefore the suits should be stayed under the said Act. In that view the learned District Munsif granted stay of the trial of the suits subject to the condition of the tenants depositing rent into Court every year but the landlord was prohibited from drawing the rents so deposited till the disposal of the suits. The plaintiff has sought to revise the orders granting stay.

I have already set out the substance of the pleadings in the case. Madras Act XIV of 1949 was passed to provide temporary protection to certain classes of tenants and ryots in the province of Madras against eviction pending contemplated tenancy legislation. That Act as originally passed was only for a period of one year but later on the life of the Act has been extended by various enactments the last of them being Act VIII of 1957 which extended it till 7th October, 1959. Section 4 of the Act states thus :

"(1) All suits or proceedings in execution of decrees or orders and other proceedings—

(2) for the eviction of tenants from their holdings or land as the case may be or in which a claim for such eviction is involved whether in addition to a claim for rent or not and which stood stayed up to the commencement of this Act or which may be instituted after such commencement in Civil or Revenue Court, shall continue to stand stayed or shall stand stayed as the case may be subject to the provisions of the following sub-sections........"

In the present case there is no dispute that the village of Pulavachari is an inam village within the meaning of the Madras Estates Land Act 1908 as amended by the Third amendment of 1936. It has been held that it is not an inam estate within the meaning of Act XXIV of 1949. Section 1 of Act XXIV of 1949 states that the Act applies to the ryots in the State of Madras governed by the Madras Estates Land Act, 1908 and tenants of private lands in such estates. But it should be either admitted or proved by the defendant who applies for stay of a suit for eviction either that he is a ryot or at least a tenant of the private land. In the present case it is not admitted that the various defendants are ryots and the suit itself is filed on the footing that the lands in their occupation are private lands. Before that question is decided the defendants claim to be entitled to a stay of suit could only be on the footing that they are tenants. The claim on behalf of the defendants was therefore made both before the lower Court and this Court on the basis that the lands were pannai lands and their possession was under a terminable lease which had been terminated. Mr. K. Vaideeswaran, the learned advocate who appeared for the petitioner, argued that on the facts disclosed there can be no relationship of landlord and tenant properly so called as the substantial claim in the written statement was only in regard to occupancy rights which claim has not yet been investigated and that no relief could be given on the basis that they were tenants of private lands.

As the learned District Munsif observed, this contention is not correct. In Para. 12 of the written statement the defendants claim the benefit of Act XXIV of 1949 which claim would be consistent with either case. Section 1 (1) of the Act makes it clear that its provisions would apply whether the defendant against whom eviction is sought is a ryot under the Madras Estates Land Act I of 1908 or a mere tenant of the private land. In the former case the civil Court would have no jurisdiction and section 4 (1) directs a stay of sale of their holding. In the latter case the Civil Court would have jurisdiction but the suit is directed to be stayed. I cannot, therefore, accept this contention.

It was next contended that the Act would apply only to cases of tenants and not to cases of tenants whose tenancy has expired by efflux of time. The contention was that the defendants were tenants whose tenancy had expired and their possession of the lands after the expiration of the lease could only amount to a tenancy by sufferance and there being no assent of the landlord for their continuance in possession they should be deemed to be only trespassers. Reference was made to Mullah's "Transfer of Property Act", 4th edn., at page 599:

" A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title had determined without the consent of the person entitled. The Madras High Court has observed that the fiction has no place after the enactment of the Transfer of Property Act. But the Act as already observed is not exhaustive and the term is a useful one to distinguish a possession rightful in its inception but wrongful in its continuance from a trespass wrongful both in its inception and in its continuance. A tenant holding over after the expiration of the term is a tenant at sufferance. If he holds over against the landlord's consent he is a trespasser and is liable for mesne profits."

The decision of the Madras High Court referred to in the above passage is reported in *Subraveti* v. *Gundala*[1].

There is, however, no definition of the word "tenant" under the Act XXIV of 1949 and the popular meaning of the word would relate to a person whose tenancy is subsisting. In certain other enactments, *e.g.*, the Madras City Tenants Protection Act III of 1922, section 2 (4), the Madras Buildings Lease and Rent Control Act

1. (1909) I.L.R. 33 Mad. 260 : 19 M.L.J. 732.

XXV of 1949, section 2 (4), and the Madras Cultivating Tenants' Protection Act XXV of 1955, section 2 (*a*) (1), define the word tenant as including a person who continues in possession after the termination of the tenancy. Mr. Vaideeswaran contends that from the definitions contained in the enactments it is implicit that persons in occupation after the termination of the tenancy would not be tenants and that was why the definitions in these enactments were specially enacted so as to include them. There being no such definition in Madras Act XXIV of 1949, he contends that the word tenant in the Madras Act XXIV of 1949 would mean only persons whose tenancy is subsisting and not those whose terms had expired and continue in possession against the will of the landlord: such persons would only be trespassers and not tenants. Reference was then made to the provisions of section 4 (2) of the Act which contemplate a claim for rent being made in the suit. The contention was that a claim for future rent is possible only against a tenant whose tenancy is subsisting and that in the present case there was only a claim for mesne profits on the foot of the defendants being trespassers. I cannot agree. The meaning of the word tenant should be gathered from the context having regard to the class of persons who were intended to be protected. Suits for ejectment would be filed only when the tenancy has expired or where the tenancy had been determined by one of the modes recognised in law (*vide* section 111, Transfer of Property Act, though it does not apply to agricultural leases). If a teancy is subsisting no question of ejectment can arise. In my opinion section 4 (1) of Act XXIV of 1949 would relate to suits, against persons whose tenancy had expired and who are liable to be evicted. The necessity for protection arises only in such cases. Section 4 (1) of the Act would be rendered nugatory if the operation of it is confined to cases where the tenancy is in force.

Unfortunately the respondents have not engaged any advocate to appear on their behalf. I requested Mr. T.R. Srinivasan, a leading member of the Bar, to represent them as *amicus curiae*. Mr. Srinivasan referred me to the object and purpose of the Act which was intended to protect the tenants against eviction by the landlords whose estates were being taken over pending a comprehensive tenancy legislation by the State. He contended that the provisions of section 4 (1) of the Act contemplate a sustainable suit or action in ejectment which means that the tenancy had expired. I agree. The provisions of section 4 (1) of the Act should apply to a case where the tenancy had expired as otherwise the object and effect of the legislation would be frustrated. But the present case cannot be disposed of on that finding. The defendants had already denied the title of the landlord. Even in their written statements they have categorically set up title to kudivaram interest in themselves. That means they have set up title against the landlord in regard to a substantial portion of the property, namely, the kudivaram interest. An assertion of title to the kudivaram right would mean a clear denial of the landlord's title in regard to that interest. It is true that a mere setting up of permanent tenancy by a periodical tenant may not in certain circumstances amount to a disclaimer of the landlord's title. A kudivaram right is not a case of mere permanent tenancy. It is something more amounting to an interest in the land, transferable and heritable. In cases where compensation is given in respect of a land acquired by the Government compensation is given to the owner of the kudivaram on the basis of his having a share in the property. Under Madras Act XXVI of 1948 the owner of the kudivaram would obtain a patta direct from the Government and the landlord would not get a right to it or compensation for it. If therefore any tenant of a private land sets up a title to the kudivaram in himself or in persons other than the landlord, it would amount to a clear denial of the title of the landlord.

In Halsbury's Laws of England, Vol. 20 (2nd edn.), Article 281 states that :

> " There is implied in every lease a condition that the lessee shall not do anything that may prejudice the title of the lessor ; and that if this is done the lessor may re-enter for breach of this implied condition. In the case of a tenancy from year to year, either in writing or verbal, the effect of such denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit."

In the Note (*m*) to that Article it is stated :—

> " Similarly where in proceedings between himself and the lessor the lessee either as plaintiff or defendant sets up an adverse title in himself a case of forfeiture arises."

In the *Law of Landlord and Tenant* by Foa (6th Edn.), at page 711, it is stated :

> " A tenancy may determine by forfeiture either by express stipulation between the parties or by act of law. The loss of the tenant's interest by breach of condition or by the operation of the proviso for re-entry on breach of a covenant (*i.e.*, by express stipulation) has already been considered. In addition to this if he sets up a title hostile to that of his landlord or even merely assist, another person to do so he likewise incurs forfeiture (by act of law) as if he delivers up possession of the premises and leases to another person with the intention of enabling him not to hold under the lease but to set " up such a title ".

In Woodfall on *Landlord and Tenant* (25th Edn.), at 1072, it is stated as follows :—

> "A disclaimer by a tenant from year to year of the title of his landlord or of the person for the time being entitled to the immediate reversion as assignee, etc., of the landlord will operate as a waiver by the tenant of the usual notice to quit and will in effect determine the tenancy at the election of the landlord or other person so entitled for a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence."

That is to say by the denial of the title of the landlord the tenant renounces his character as such tenant and thereby incurs a forfeiture of the tenancy. In case the landlord elects to take advantage of the disclaimer, the tenancy comes to an end because the tenant says that he was not a tenant by repudiation of the title of the landlord and the landlord says that he does not want the tenant and re-enters on the property. Essentially a tenant is a person who holds under a landlord and if that relationship is repudiated and the landlord also elects to enforce the forfeiture, that relationship would come to an end. The tenant could not be termed as such as there is no relationship of landlord and tenant subsisting. This is exactly what happened in the present case. The tenants repudiated the title of the landlord earlier and in the suit and the landlord elected to take advantage of the denial of his title. The result of this denial of title and election to forfeit the lease is that the tenants are no longer tenants but trespassers. In *Namdeo Lokman Lodhi* v. *Narmada Bai*[1], the Supreme Court held that in respect of a lease to which the Transfer of Property Act did not apply forfeiture is incurred when there is a disclaimer of title or there is non-payment of rent. Any subsequent act of the landlord electing to take advantage of a forfeiture is not a condition precedent to the right of action for ejectment. The bringing by a landlord of a suit for ejectment is simply a mode of manifesting his election. It has been held in *Narasimha* v. *Achiah*[2], that provision as to written notice contained in section 111 (*g*) of the Transfer of Property Act in regard to forfeiture by reason of denial of title would not apply to an agricultural lease and that no written notice by the landlord is necessary for taking advantage of the forfeiture incurred by the tenant. In the present case we are not concerned with the question as to whether the defendants had made out their claim for occupancy rights. That is a matter which has got to be decided in the suit, and if it is decided in favour of the defendant the plaint will have to be returned for presentation to the proper Court. As stated already it is assumed for the purposes that the lands are the pannai lands of the plaintiff and the defendants are yearly tenants. The position then is that the defendants have denied their tenancy and the plaintiff has elected on such a denial to bring a suit for ejectment which they are entitled to under the law. In the absence of any definition in the Madras Act (XXIV of 1949) of the word tenant so as to include a person who has incurred forfeiture of tenancy, I would hold that the defendants are not tenants as the tenancy has been put an end to by reason of the cessation of relationship of landlord and tenant.

As I stated already if the case had been merely one where the tenant was sought to be ejected by reason of efflux of time the provisions of Act (XXIV of 1949) would apply. But as the case is one where the tenancy has been extinguished by forfeiture the provisions of the Act cannot be so construed as to revive or resurrect what is dead and gone. In this connection I may refer by way of illustration to two other modes of the determination of a lease, *viz.*, (1) surrender ; (2) where the interest of the lessor itself had terminated. In both these cases, it cannot be held that the tenant would have a right to continue in possession as a tenant. In all these cases, *i.e.*, forfeiture,

1. (1953) 1 M.L.J. 715 : (1953) S.C.J. 306 : 1953 S.C.R. 1009 (S.C.).
2. (1954) 2 M.L.J. 83.

surrender and the like of the landlord coming to an end the tenancy ceases and in my opinion the provisions of Madras Act (XXIV of 1949) as extended to later years would not apply. There is nothing in the Act to warrant the extension of its benefit to such cases. In this view I am of the opinion that the orders of the lower Court granting a stay of the suit cannot be sustained. The orders of the lower Court are therefore set aside. The lower Court should proceed with the trial of the suits and if it is proved that the lands are ryoti lands and that the defendants have occupancy rights the plaints should be returned for presentation to the lower Court.

If however it is held that the suit lands are pannai lands, it should hear the suits on all the issues and dispose it of in the light of its finding. The lower Court should also give appropriate directions as to any rent that might have been deposited in pursuance of the order under revision. The C.R.Ps. are allowed with costs. One advocate's fee to be distributed between the Respondents in various C.R. Ps.

I must express my thanks to Mr. T. R. Srinivasan for the very able way in which he assisted the Court by conducting the case on behalf of the Respondents.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

G.J. Coelho .. *Petitioner**

v.

The State of Madras represented by the Agricultural Income-tax Officer, Gudalur .. *Respondent.*

Madras Agricultural Income-tax Act (V of 1955), section 5 (e) and (k)—Applicability—Permissible deduction—Interest paid on money borrowed for acquiring land—If permissible deduction.

The nature of the loan and the interest paid thereon contemplated under section 5 (*k*) of the Madras Agricultural Income-tax Act, 1955, is that the borrowed amount should have been actually spent on the land, *viz.*, for any agricultural or horticultural purposes or any purpose subservient thereto. An expenditure for the purpose of purchasing the land itself is not an expenditure 'on the land' within the scope of that sub-section. A loan borrowed for the purpose of purchasing the land, though of a capital nature, the interest paid on the said loan in the year of account is not of a capital nature. A payment of interest on a loan incurred for the acquisition of land, which is the source of taxable income under the Act, will satisfy the requirements of section 5 (*e*) of the Act and will constitute a permissible deduction under that sub-section as expenses laid out or expended wholly and exclusively for the purpose of the land.

Petition under section 54 (1) of the Madras Plantations Agricultural Income-tax Act, 1955, praying the High Court to revise the order of the Madras Plantations Agricultural Income-tax Appellte Tribunal, Madras, dated 11th February, 1957 and passed in Appellate Tribunal Appeal, No. 40 of 1956 preferred against the Order of the Assistant Commissioner of Agricultural Income-tax, Ootacamund, in A.I.T.A. No. 47 of 1956-57 against Assessment Order, dated 7th June, 1956, in G.I.R. No. 1-C/55-56 on the file of the Agricultural Income-tax Officer, Gudalur.

R. Rajagopala Ayyar, for Petitioner.

G. Ramanujam for the Government Pleader (*K. Veeraswami*) on behalf of the Respondent.

The Order of the Court was made by

Rajagopalan, J.—Under the provisions of the Madras Agricultural Income-tax Act (V of 1955) the petitioner was assessed to tax in the assessment year 1955-56 on his agricultural income from his plantation known as the Silver Cloud Estate, in the "previous year" ending with 30th June, 1954. The petitioner purchased that estate in 1950 for Rs. 3,10,000, to pay which he had to borrow Rs. 2,90,000 from two sets of creditors. In the year of account the petitioner paid those creditors a sum of

* T.R.C. No. 53 of 1957. 19th January, 1960. (29th Pausa, 1881—Saka.)

Rs. 22,628-9-8 as interest on those loans, and he claimed that the whole of that payment should be deducted before his assessable income was computed. The Department held that the petitioner was entitled only to the relief for which section 5 (*k*) of Act V of 1955 provided and deducted a sum of Rs. 1,570-10-7. The petitioner appealed to the Tribunal. The Tribunal rejected his contention, that he was entitled to have the whole amount deducted under section 5 (*e*) of the Act. It was the correctness of that decision that the petitioner challenged in this petition presented under section 54 (1) of the Act.

The relevant statutory provisions in section 5 of Act V of 1955 are :

"The agricultural income of a person shall be computed after making the following deductions namely :—

* * * *

(*e*) Any expenses incurred in the previous year (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the land ;

* * * *

(*k*) any interest paid in the previous year on any amount borrowed and actually spent on the land from which the agricultural income is derived ;

Provided that the need for borrowing was genuine having due regard to the assets of the assessee at the time ;

Provided further that the interest allowed under this clause shall be limited to nine per cent. on an amount equivalent to twenty-five per cent. of the agricultural income from the land in that year."

What the petitioner paid to his creditors in the year of account was interest on the amount borrowed for the purchase of the land, on the income from which he was liable to be assessed to tax. When the principal amount borrowed in 1950 and 1951 was expended for the purchase of the land, the estate, that was an expenditure of a capital nature. That may have no direct bearing on the question, whether the amount expended as interest in the year of account falls within the scope of section 5 (*k*) of the Act. Independent of the capital nature of the expenditure incurred when the estate was purchased by the petitioner, we are clearly of opinion that the payment of interest charges in the year of account did not fall within the scope of section 5 (*k*). What section 5 (*k*) requires is that the borrowed amount should have been actually spent on the land. When the petitioner used the money he had borrowed for the purchase of the land itself, it is difficult to look upon it as an expenditure on the land within the scope of section 5 (*k*). No portion of that borrowed money was spent on the land itself, for example for any agricultural or horticultural purposes or any purpose subservient thereto. The expenditure for the purchase of the land is not in our opinion, an expenditure on the land, as we understand the scope of that expression in section 5 (*k*) of Act V of 1955.

The petitioner's claim has been all along that the deduction he claimed fell within the scope of section 5 (*e*) of the Act. That the expenditure was incurred in the year of account was never in dispute. That expenditure in the year of account was not of a capital nature. Though the expenditure of the amount borrowed for the purchase of the land was of a capital nature, the payment of interest in the year of account on the amount so borrowed and spent did not constitute an expenditure of a capital nature, and we have no hesitation in rejecting the contention of the learned Government Pleader that the payment of interest charges under such circumstances would partake of the same character as the expenditure of the principal amount borrowed, that is, that the expenditure incurred when the interest was paid was also of a capital nature. Such expenditure did not obviously constitute the personal expenses of the assessee, the petitioner. What the petitioner has still to establish to bring his claim within the scope of section 5 (*e*) of the Act is that the expenditure was incurred or laid out wholly and exclusively for the purpose of the land.

The Tribunal held that that test was not satisfied. The Tribunal recorded :

" It is not possible to agree with the contention that interest paid in the year of account towards a loan borrowed by the proprietor for the purpose of acquisition of the estate will fall within the category of ' expenditure wholly and exclusively laid out for the purpose of the plantation '. The immediate object of the expenditure (*i.e.,*) payment of interest is to liquidate a personal liability of the proprietor as a debtor. That after such borrowing the debtor used it as sale price and acquired the estate, cannot make the payment of interest an ' expenditure wholly and exclusively laid out for the purpose of the plantation.' The language of the various sub-divisions of section 5 of the Act referring to the various items of permissible deductions must have a direct and proximate connection. Here, the proximate connection of the payment is with a personal loan and not with plantation........I hold that the claim has been rightly rejected."

We are unable to accept as correct that, where a personal liability was also discharged by a payment, it can never constitute expenditure incurred wholly and exclusively for the purpose of the land. Section 5 (*e*) of the Act would be robbed of much of its content if such a narrow view is taken, because in most cases, and not only in cases of payment of interest, there will always be also a personal liability which is discharged by the payment.

Section 5 (*e*) of that Act, of course, does not in express terms provide for interest charges. If the express provision made for deducting interest charges in section 5 (*k*) of the Act were to apply, then obviously the application of section 5 (*e*) would be excluded even if all the statutory requirements of section 5 (*e*) are satisfied, on the short ground that an express statutory provision of special application like section 5 (*k*) excludes the operation of another like section 5 (*e*) which is general in its scope. We have already held that section 5 (*k*) of the Act does not apply to the expenditure incurred by the petitioner. Whether the claim falls within the scope of section 5 (*e*) is therefore independent of any possible application of section 5 (*k*) of the Act.

Provision for deduction of interest charges incurred by an assessee in computing his net or assessable income is familiar enough in the Indian Income-tax Act. Express provision for such deduction has been made in the Proviso to section 8 (income from securities), section 9 (iv) (inclome from property) and section 10 (2) (iii) (income from business) of the Income-tax Act. No such express provision is made in section 12 of that Act for computing the income from other sources. But what section 12 (2) of the Income-tax Act permits is a deduction of any expenditure not being in the nature of a capital expenditure incurred solely for the purpose of earning income, profits and gains.

We are leaving out of account the cases decided under the English Income-tax Act, where the Statutory Provisions for the allowance and express provisions for disallowance of interest charges are different ; the scheme is quite different from that which underlies the Indian Income-tax Act.

In *Eastern Investments, Ltd.* v. *Commissioner for Income-tax*[1], the Supreme Court laid down at page 598:

" The following principles are relevant :

(*a*) Though the question must be decided on the facts of each case, the final conclusion is of law.............

(*b*) It is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned................

(*c*) It is enough to show that the money was expended not of necessity and with a view to a direct and immediate benefit to the trade voluntarily and on the ground of commercial expediency, and in order, indirectly to facilitate the carrying on of the business.'

(*d*) Beyond that no hard and fast rule can be laid down to explain what is meant by the word 'solely'."

1. (1951) S.C.J. 420 : (1951) S.C.R. 594 : I.L.R. (1952) 2 Cal. 1225.

At page 601 the learned Judges observed :

> " This being an investment company, if it borrowed money and utilised the same for investments on which it earned income, the interest paid by it on the loans will clearly be permissible deduction under section 12 (2) of the Income-tax Act."

The statutory requirements of section 5 (*e*) of Act V of 1955 are more analogous to those of section 10 (2) (*xv*) than those of section 12 (2) of the Income-tax Act. What section 5 (*e*) of Act V of 1955 requires is that the expenditure should be laid out wholly and exclusively for the purpose of the land. Section 10 (2) (*xv*) of the Income-tax Act requires the expenditure to be laid out wholly and exclusively for the purpose of the business. 'Laid out or expended for the purpôse of the business' is obviously of greater amplitude than 'expended for purposes of earning the income which it is necessary to establish to permit a deduction under section 12 (2) of the Income-tax Act. The decision in *Eastern Investments, Ltd.* v. *Commissioner of Income-tax*[1], makes it clear that the payment of interest on a loan contracted for investment is an expenditure for purposes of earning income from that investment. The loan would obviously satisfy the test, that it had been expended for purposes of the investment had that been the statutory test. In *Newton Studios Ltd.* v. *Commissioner of Income-tax*[2] this Court held that the principles laid down by the Supreme Court in *Eastern Investments Ltd.* v. *Commissioner of Income-tax*[1], would apply with equal force to cases that fall within the scope of section 10 (2) (*xv*) of the Income-tax Act. Extending the principle laid down by the Supreme Court in *Eastern Investments Ltd.* v. *Commissioner of Income-tax*[1] to the interpretation of the language of section 10 (2) (*xv*) of the Income-tax Act, it seems clear to us that, if a loan was contracted and expended for purposes of the business, for example, for acquiring it, then the payment of the interest would be an expenditure for purposes of the business. It will not however fall within the scope of section 10 (2)(*xv*) of the Income-tax Act as it stands, because specific provirion has been made for such deduction in section 10 (2) (*xv*) which excludes expressly deductions for which provision has already been made in any of the other clauses of section 10 (2) of the Income-tax Act. In other words, but for section 10 (2) (*iii*) there should be no difficulty in holding that such an expendiure satisfied the test of 'having been laid out for purposes of the business'. It would satisfy even the narrower test, as pointed out by the Supreme Court in the *Eastern Investments Ltd.* v. *Commissioner of Income-tax*[1], that it had been expended for purposes of earning income from the business. If that principle is extended and applied to the interpretation of section 5 (*e*) of Madras Act V of 1955, the payment of interest on a loan expended for the acquisition of the land, which is the source of taxable income, will satisfy the requirement of section 5 (*e*). It will be an expenditure for purposes of the land within the scope of section 5 (*e*) of Act V of 1955.

If it is expenditure incurred for purposes of the land within the meaning of section 5 (*e*) of Act V of 1955, there should be no difficulty in holding further that that expenditure was incurred wholly and exclusively for the purposes of the land. We have already pointed out that the facts, that the petitioner as a borrower was under a personal liability to repay the loan, and that the payment of interest in the year of account was also in discharge of that personal liability, made no difference. The personal liability for the loan had itself been incurred for purposes of land, that is for the purpose of acquiring land and the income it was expected to yield. The learned Government Pleader referred to the observations of Stone, C.J., in *Metro Theatre Bombay Ltd.* v. *Commissioner of Income-tax*[3]. Dealing with section 10 (2) (*xii*) of the Income-tax Act as it stood then (it corresponds to section 10 (2)(*xv*) of the present Income-tax Act) the learned Chief Justice observed :

> " In my judgment this interest payment on unpaid instalments cannot be stated to be wholly or exclusively a payment for purposes of such business. No doubt the payment of interest on the arrears of the purchase price of this leasehold interest in which the business is carried on may be said to be

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1. I.L.R. (1952) 2 Cal. 1225 : (1951) S.C.J. 378. 420 : 1951 S.C.R. 594.
2. (1955) 2 M.L.J. 514 : (1955) 28 I.T.R.
3. (1946) 14 I.T.R. 638.

for purposes of the business. But it is not wholly and exclusively for purposes of the business. For example if the cinema business had to be closed down, the appellant would still have to make this payment unless he was prepared to have the license forfeited."

These observations were really in the nature of obiter. Besides, there is obviously a difference between the unpaid instalments the learned Chief Justice had to consider in that case and a loan contracted to provide the capital for investment in business, or as in this case for the purchase of the land, the income yielding investment. With all respect to the learned Chief Justice we are unable to agree with the implied principle, that though the payment of interest would satisfy the test that it had been incurred for purposes of the business, it would not satisfy the further test, that it must have been incurred wholly and exclusively for that business. If, for example the petitioner were to sell the land in this case, the liability to pay the loan and the interest thereon would still be there. But the petitioner cannot claim any allowance for that expenditure under section 5 (*e*) of the Act, not because it was his personal liability that was diminished by that payment, but because after such a sale there will be no gross income from the land from which the allowance could be deducted. So long as the source of income to acquire which the loan had been expended stood, such an expenditure would be wholly and exclusively for purposes of that source of income, and the payment of interest thereafter would also be an expenditure incurred wholly and exclusively for that purpose, that is, the purpose of the land, within the scope of section 5 (*e*) of the Act.

We are clearly of opinion that the deduction claimed by the assessee fell within the scope of section 5(*e*) of the Act and that the whole of Rs. 22,628-9-8 and not merely Rs. 1,570-10-7 should have been deducted from his assessable income. The order of assessment will be revised accordingly.

The Petitioner will be entitled to his costs. Counsel's fee Rs. 100.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S.V.R.B.K.R. Gopalan .. *Petitioner**

v.

The Estates Abolition Tribunal, Vellore and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari Act (XXVI of 1948), *section* 13 (*b*) (*iii*)—*Applicability and scope—Tank-bed—Cultivation by inamdar long prior to 1st July,* 1945 *owing to inclusion of lands in ayacut of Cauvery-Mettur project—Absence of order of District Collector under section 20-A, Estates Land Act as amended in* 1935—*Effect—Right of inamdar to ryotwari patta—Madras Estates Land Act (I of* 1908), *section* 3 (16) (*a*)—*Scope of.*

Section 13 (*b*) (iii) of Madras Act (XXVI of 1948,) excludes from the category of lands, in respect of which the Inamdar (landholder) would be entitled to a ryotwari patta, lands of the description specified in section 3 (16) (*a*) of the Madras Estates Land Act, namely tank-beds, although the tank is not in factual existence, and had been abandoned as such on account of the inclusion of the lands of the Inam in the Cauvery-Mettur Project.

A tank bed denotes an area which is intended to hold water for the irrigation of the lands under its ayacut. It is not necessary, however, that the entire area should always be actually under water. The land would not lose its character as a tank-bed merely because cultivation has been carried by the landholder. When at the date of the commencement of the Estates Land Act an irrigation tank existed in an estate, the tank would continue to be a tank-bed notwithstanding the cultivation thereof by the landholder. Such cultivation is allowed by reason of the right of the proprietor over the property (without prejudice to the rights, if any, of the ryots), and not because the land gets converted into a ryoti or private land. The existence of a proprietary right in the tank which enabled the landholder to cultivate the tank-bed land is, by itself, of no importance for the purpose of determining the scope of the statutory rights which would be claimed under section 13 (*b*) (iii) of Madras Act (XXVI of 1948). Prior to 1934 what was a tank-bed on the date when Madras Act (I of 1908) came into force continued as tank-bed land. Section 20-A, inserted in the Act

* W.P. No. 1333 of 1956. 13th October, 1959.
21st Asvina, 1881—Saka.

(1 of 1908) by the Amending Act (Madras Act VIII of 1935) provided for the conversion of the tank beds, among other communal lands, into ryoti lands. It could be so converted only by an order passed by the District Collector under section 20-A, and till such an order is made, the land would not lose its character and become ryoti land by mere non-user of the tank. Where no such order had been made until the date of notification of the estate under (Madras Act XXVI of 1948 the land must be held to retain its character as tank-bed within the meaning of section 3 (16) (*a*) of the Estates Land Act, and would come within the scope of the lands excluded by section 13 (*b*) (iii) of the Madras Estates (Abolition and Convertion into Ryotwari) Act, 1948.

W. P. No. 728 of 1957, approved and followed.

Samayan Servai v. *Kadir Moideen*, (1918) 51 I.C. 899, distinguished.

Meeralli Ambalam v. *Shanmugha Rajeswara Sethupathi*, (1933) 66 M.L.J. 338 : I.L.R. 57 Mad. 593, *Ramaswami Gounder* v. *Ramaswami Gounder*, (1942) 2 M.L.J. 595 : I.L.R. (1943) Mad. 331 *Balusamy* v. *Venkatadri Appa Rao*, (1917) 47 I.C. 594 and *Narayanaswami* v. *Kamanna*, (1919) 51 I.C. 318, relied on.

Petition, under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in A.S. No. 130 of 1955 dated 25th May, 1956, on the file of the Estates Abolition Tribunal, Vellore, and quash the order therein.

V. Vedantachari for *M. Ranganatha Sastri* and *S. Bhaskaran*, for the Petitioner.

T. Ramakrishuan, for Additional Government Pleader (*M. M. Ismail*) on behalf of the Respondents.

The Order of the Court was delivered by

Ramachandra Iyer, J.—.—This is a petition under Article 226 of the Constitution for the issue of a writ of *certiorari* or any other appropriate writ to call for the records in A.S. No. 130 of 1955, on the file of the Estates Abolition Tribunal, Vellore, and to quash the order therein.

The Inam village of Vikramam in the Tanjore District was notified by the Government under the provisions of Madras Act XXVI of 1948; the estate was taken over by the Government on 1st October, 1951. The petitioner, who had purchased the share of one of the erstwhile inamdars, filed an application, under section 13 of the Act, before the Assistant Settlement Officer, for the grant of ryotwari patta in respect of 52 items of land in the village. The Officer granted him patta for 46 items, but declined to do so for the remaining six. From the order of the officer, there was an appeal by the petitioner to the respondent, the Estates Abolition Tribunal, Vellore, in respect of two of the items, namely, items 48 and 49. Those items are situated in S. No. 213/2, and are 2.24 and 0. 42 acres respectively in extent. The Tribunal, accepting the view of the Assistant Settlement Officer held that, as S. No. 213/2 was classified, as part of tank poromboke, the petitioner would not be entitled to a ryotwari patta in respect of the two items. The legality of the order of the Tribunal is sought to be challenged in this petition.

It is now admitted that the lands covered by S. No. 213 of which the items now in controversy form part, originally constituted the bed of a tank which was an irrigation source for the lands in the village. It is also admitted that the tank existed before and after the coming into force of the Madras Estates Land Act (I of 1908). The Record of Rights relating to the village Vikramam, which was prepared in 1934, designates the land as tank poromboke. But the tank ceased to have any utility as an irrigation source after the introduction of Cauveri Mettur Project. Thereafter, the irrigation of the lands under the ayacut of the tank was provided for by the irrigation channels constructed under the project. The ayacut of the tank was transferred to that under the project. The tank, in course of time, appears to have become silted up. The inamdar began cultivating the tank-bed lands : those lands were also included in the ayacut of the Cauveri Mettur Project. It is stated on behalf of the petitioner that there was continuous cultivation by his predecessors-in-title of the lands since at least from 1944. There is evidence to show that the inamdar dealt with the properties since then as iruwaram lands belonging to him.

Before the Tribunal, contentions were raised as to the correctness of the entry in the Record of Rights relating to the lands now in controversy. Those contentions were, however overruled. As we stated already, it is now conceded that the lands which form the subject-matter of this petition formed the bed of an irrigation tank.

Mr. V. Vedantachariar, the learned advocate for the petitioner contended that, whatever might be the entry in the Record of Rights, the tank factually ceased to be such long prior to the date of the notification under Act XXVI of 1948; and that, the bed thereof being cultivable land, and in fact cultivated since at least from 1944, should be treated as a land coming within section 13 (*b*) (iii) of the Act. It is conceded that the land could not be treated as private land. But the basis of the claim is not that the land became a private land at any time, but that when the tank bed was abandoned for the purposes of a tank, it became a ryoti land, and that in the present case no ryot having been let into possession, the Inamdar would be entitled to a ryotwari patta under the aforesaid provision, he having continuously cultivated from a time anterior to 1st July, 1945. Section 13 (*b*) (iii) runs :

> " All lands (not being (i) lanka lands, (ii) lands of description specified in section 3, clause (16) sub-clause (*a*), (*b*), and (*c*) of the Estates Land Act, or (iii) forest lands) which have been abandoned or relinquished by a ryot, or which have never been in the occupation of a ryot, provided that the landholder has cultivated such lands himself, by his own servants or by hired labour, with his own or hired stock, in the ordinary course of husbandry, from the 1st day of July, 1945 and has been in direct and continuous possession of such lands from that date ".

This provision excludes the lands coming under section 3 (16) of the Estates Land Act, which runs thus :

> " ' Ryoti land ' means cultivable land in an estate other than private land but does not include (*a*) beds and bunds of tanks and of supply, drainage surplus or irrigation channel ".

Prima facie, therefore, the landholder would not be entitled to patta in respect of a tank-bed land. But it is contended on behalf of the petitioner that, in order to disentitle the landholder to the benefits of section 13 (*b*) (iii) of the Act, the tank should be in factual existence, and that an abandoned tank would not come within the terms of section 3 (16) (*a*) set out above. It is further contended that, in order to constitute a tank-bed, the area in controversy should be covered with water, and that, where a tank which was an irrigation source at one time was abandoned by reason of other sources of irrigation coming into existence, the tank-bed would properly become the property of the landholder.

Reliance was placed, in this connection, upon the decision in *Samayan Serval* v. *Kadir Moideen*[1]. In that case an irrigation tank in an estate was abandoned by reason of irrigation facilities being provided by the Periyar scheme. The bed of the tank was utilised by the owner of the Estates for his own purposes. The ryots of the village disputed the right of the landholder to divert the bed of the tank to purposes other than those, for which it was originally intended, namely, as a source of irrigation for the lands under its ayacut. It was held that, while the zamindar would have no power to do away with the tank, in the maintenance of which a large number of ryots would be interested, there was no such duty where the system of irrigation under the tank was rendered unnecessary by new irrigation facilities which provided the accustomed supply of water from the new source, and that the landholder would be under no obligation to maintain the old system. Napier, J., observed at page 903 :

> " I am, therefore, of opinion that the enjoyment of the tank-bed to the extent of the utilisation of water stored in it, is a right which only exists as long as it is the duty of the zamindar to preserve such a tank and that where he is in a position to give all proper water facilities from the tank without such storage, he is under no obligation to maintain the old system ".

Where, therefore, the maintenance of a tank was unnecessary by reason of the ryots under its ayacut getting their accustomed supply of water from other sources, and no damage was caused to them by the tank-bed being used for cultivation or for purposes other than that of storage water, the landholder was held to be under no obligation to preserve the tank for the storage of water. The decision in that case was concerned with the liability of the zamindar to maintain the irrigation source even after

1. (1918) 51 I.C. 899.

the introduction of another and an efficient source. The question, whether the original tank-bed would cease to be such and become a ryoti land, was not, however, considered in that case.

A tank-bed denotes an area which is intended to hold water for the irrigation of the lands under its ayacut. It is not necessary, however, that the entire area should always be actually under water. Except in cases where the ryots are proved to have certain rights in the beds of tanks situate in an estate, the normal rule is that the tank belongs to the proprietor, subject to his obligation to maintain the tank as an irrigation source. Where the landholder is the proprietor of a tank, it would always be open to him to cultivate such portions of the tank-bed, in which there is no water. In *Balusamy* v. *Venkatadri Appa Rao*[1], a bench of this Court held that, in order to constitute a tank-bed within the meaning of section 3 (16) (*a*) of the Estates Land Act, it was not necessary that the bed should be under water, that the term 'tank-bed' would include lands which were capable of being cultivated when the tank had become dry or when there was no water therein and that the tank-bed lands cultivated by the landholders were neither private lands nor ryoti lands. In *Narayanaswami* v. *Kamanna*[2], a tank in an estate was abandoned long prior to the coming into force of the Madras Estates Land Act. A question arose whether the ryot acquired occupancy right in respect of it. It was held that the land, which was a tank bed, would not be ryoti land and a suit to eject a tenant from such land would be cognizable by a civil Court. The learned Judges further held that section 3 (16) of the Madras Estates Land Act would apply only to those tank-beds which had not lost their character as tank-bed on the date when the Madras Estates Land Act came into force. In *Meeralli Ambalam* v. *Shanmugha Rajeswara Sethupathi*[3], certain plots of lands in a portion of the tank-bed situate in an estate were submerged in normal times after the rainy season. But they were brought under cultivation in other seasons of the year. It was held that the lands did not cease to be a tank-bed, because cultivation was carried on in certain seasons. Venkatasubba Rao, J., observed at page 341 :

"The definition of "ryoti land" excludes in terms tank-beds..........A certain land is either ryoti or tank-bed and unless it ceases to possess the character of a tank-bed, it cannot be ryoti".

The decision was rendered prior to the amendment of the Madras Estates Land Act in 1934, which introduced section 20-A. That the principle of the cases which we have cited above would hold good even after the amendment is made clear by the the decision in *Ramaswami Gounder* v. *Ramaswami Gounder*[4]. It was held in the latter case, that, where the proprietary rights of the landholders of an estate in the tank-beds were unaffected by custom, the ryots of the village would have no interest in the land apart from the right to use the water therein for the purpose of cultivating their holdings, and that the landholder would be entitled to cultivate such parts of the bed of the tank as become exposed when the water receded in the dry season, provided that the cultivation did not prevent the water spreading when the rains came. The result of the decision is that it would be open to the proprietor to cultivate the tank-bed in cases where there was no customary right in the ryots prohibiting such cultivation, and that the right of the latter was only a right to secure the proper maintenance on the part of the landholder of the tanks so as to afford the accustomed supply of water for their holding. Therefore, when at the date of commencement of the Estates Land Act an irrigation tank in the estate existed, the tank-bed would continue as a tank-bed thereafter, notwithstanding the cultivation thereof by the landholder. Such cultivation is allowed by reason of the right of the proprietor over the property (without prejudice to the rights if any of the ryots), and not because that the land gets converted into a ryoti or private land thereby. The existence of a proprietary right in the tank, which enabled the landholder to cultivate tank-bed lands, is by itself of no importance for the purpose of determining the scope of the statutory rights which will be claimed under section 13 of Act XXVI of 1948. Prior to 1934 what was a tank-bed on the date Act I of 1908 came into force continued as a

1. (1917) 47 I.C. 594.
2. (1919) 51 I.C. 318.
3. (1933) 66 M.L.J. 338 : I.L.R. 57 Mad. 331.
4. (1942) 2 M.L.J. 595 : I.L.R. (1943) Mad. 593.

tank-bed land. Section 20-A of the Estates Land Act, which was introduced into the main Act by Madras Act VIII of 1935, provided for the conversion of the tank-bed among other communal lands into ryoti lands. That section, so far as it is necessary for the present case, runs :

"20-A. (1) Subject to such rules as the Provincial Government may prescribe in this behalf, the District Collector may on the application of the landholder a ryot or any other person interested—

(a) declare that any land or any portion of any land which is set apart for any of the purposes referred to in sub-clauses (a) and (b) of clause (16) of section 3 is no longer required for its original purposes ; and (b) by order in writing direct—

(i) that any such land or portion in respect of which such declaration is made, be used for any other specified communal purpose ; or

(ii) if such land or portion is not required for any communal purpose, that it be converted into a ryotwari land or landholder's ryoti land according to the reversionary rights in such land vest under the terms express or implied, of the sanad, title-deed or other grant in the Crown or in the landholder."

On its terms the provisions of the section would apply to all cases where there was a tank on the date when the Madras Estates Land Act came into force. Once, therefore, there was a tank on that date, the tank-bed land could be converted into a land of different character only under an order passed by the Collector under the provisions of section 20-A and till such an order was made, the land would not lose its original character as a land reserved for communal purposes. So long as there was no order by the District Collector under section 20-A it must be held that a mere non-user of the tank, which existed on the date when the Estates Land Act came into force, could not make its bed a ryoti land, although the landholder, as proprietor, might have certain rights for the cultivation of its bed so long as he continued to be the holder of that estate. In the present case, till the date when the notification was made, there had been no order of the Collector under the provisions of section 20-A converting what was tank-bed land into a land of any other category. It follows that, on the date when the Act came into force, S. No. 213 retained its character as a tank-bed within the meaning of section 3 (16) (a) of the Estates Land Act : it therefore came within the scope of what was excluded by section 13 (b) (iii) of Act (XXVI of 1948).

It was next contended by the learned Advocate for the petitioner that, as the lands though tank-bed in origin, had been included in the Cauvery-Mettur Project ayacut, it should be held that there had been an order of the Collector under section 20-A of the Estates Land Act, as, according to the petitioner an order of inclusion under the Cauvery-Mettur Project ayacut would be tantamount to an order under section 20-A. Section 20-A is a statutory provision. Rules have also been made by the Government under the provisions of that section for the exercise of jurisdiction vested in the Collector for conversion of tank-bed and other communal lands into ryoti or other lands. Admittedly, the procedure prescribed by the rules have not been followed. In our opinion, a mere grant of permission to irrigate from the water of the Cauvery-Mettur Project or even a recognition by the authorities of such irrigation and cultivation of the tank-bed lands would not amount to an order under section 20-A. The precise question before us arose for consideration in W.P. No. 728 of 1957. Rejecting a similar contention, Rajagopala Ayyangar, J., observed :

"I am unable, however, to agree in the contention that the permission to cultivate the tank-bed lands in pursuance of the Grow More Food Campaign or the inclusion of these items in Cauvery-Mettur Project ayacut could by themselves either independently or in conjunction, constitute a release from the reservation under section 3 (16) (a) of the Estates Land Act, which only an order under section 20-A can effect. Section 20-A is a statutory provision by which the lands set apart for the purposes named in section 3 (16) (a) could be disannexed from that obligation."

We are in complete agreement with the observations of the learned Judge. It follows that the order of the respondent declining to grant patta in respect of S. No. 213/2 is correct. The Tribunal has, however, made a recommendation to the Government that, in case it decides to give away the lands on patta, the claim of the petitioner should be duly considered by the authorities, in view of long enjoyment

of the lands by him and his predecessors-in-title. As we pointed above, the lands have been in continuous cultivation by the landholder, and the petitioner purchased the same for consideration. In the circumstances, we endorse the recommendation of the Tribunal.

The rule *nisi* is discharged. In the circumstances there will be no order as to costs.

P.R.N. ——— *Rule discharged. Petition dismissed.*

IN THE HIGH COUUT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

G. Gopal Chettiar .. *Petitioner**

v.

The Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Madras and others.. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 100 (2) (*m*) *and rules* 1, 9 *and* 10—*Scope—Rule* 9 *is directory—Failure to get the sanction—Leave becomes voidable—Rule* 10 —*Power of veto—To be exercised within the prescribed period.*

Rule 1 framed under section 100 (2) (*m*) of the Madras Hindu Religious and Charitable Endowments Act (1951) requiring the trustees to effect leases by public auction is within the rule-making power.

Rule 9 lays down that leases otherwise than by public auction shall not be resorted to except with the previous sanction of the Deputy Commissioner. Rule 10 gives power to the Commissioner to veto the leases effected by the trustees, within one month. Otherwise the lease shall be deemed to have been approved.

Rules 9 and 10 had to be read together and rule 9 should be read so as to effectuate the purposes for which it was framed. Rule 9 was directory and failure to obtain the Deputy Commissioner's sanction only makes it voidable and that could properly be a ground upon which it could be vetoed by the Commissioner under rule 10. The veto has to be exercised within the period of one month prescribed under rule 10.

In this view the order of the Commissioner was held to be without jurisdiction and set aside.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order in R.C. 13267/57-B2, dated 3rd July, 1957, on the file of the 2nd Respondent herein. and the order of the 1st Respondent in D.Dis. No. 14996, dated 16th July, 1957 and to quash the same.

R. Gopalaswami Iyengar, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*) and *S. Nagaraja Iyer*, for Respondents.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *certiorari* to call for the records of the Commissioner, Hindu Religious and Charitable Endowments and the Deputy Commissioner, Tanjore and to quash their orders by which a lease granted in favour of the petitioner by the trustee of the Swayambunathaswami temple was cancelled.

It is necessary to set out a few facts to appreciate the contentions of the petitioner. The 3rd Respondent in this petition, the Pandarasannathi of the Dharmapuram Adhinam is the hereditary trustee of the abovesaid Swayambunathaswami temple at Peralam. The present petition is concerned with a lease effected by the trustee, of an extent of 275.96 acres of nanja and 22.28 acres of punja, in favour of the petitioner on an annual rental of 2,900 kalams of paddy, Rs. 300 in cash, 500 coconuts,

* W.P. No. 788 of 1957. 1st October, 1959. 9th Asvina, 1881—Saka.

500 coconut palm leaves, 400 bundles of straw, 5 kalams of blackgram and 5 kalams of green gram. The term of the lease was 5 years and the lease was granted on 14th June, 1957. Freshes were soon expected in the river and hence agricultural operations had to be immediately commenced and the petitioner did so. But meanwhile by an order dated 16th July, 1957 pased by the Commissioner, the said lease has been directed to be cancelled and it is the validity of this cancellation that is challenged in this writ petition.

Before, however, discussiong the questions involved, there is one fact that I need mention, that the trustee, the 3rd Respondent appeared through Counsel and supported the petitioner in impugning the validity of the order of the Commissioner, for the reason that the lease executed by him was in the best interests of the institution, and that the institution would suffer grievous injury if the lease were cancelled. I shall now proceed to set out the statutory provisions which are relevant for the decision of this petition.

Section 29 (1) of Madras Act XIX of 1951, the Hindu Religious and Charitable Endowments Act, enacts.

"Any exchange, sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to, or given or endowed for the purposes of, any religious institution shall be null and void unless it is sanctioned by the Comm'ssioner as being necessary or beneficial to the institution."

As the lease in the present case was not for a term exceeding 5 years, it was within the powers of the trustee to enter into, and was not avoided for want of sanction of the Commissioner under section 29 (1). Section 100 of the Act enables Government to make rules to carry out the purposes of the Act, and in particular sub-section (2) (*m*) of that section enables rules to be made with referrence to 'the manner in which and the period for which leases of properties of religious institutions shall be made'. Rules have been made under section 100 (2) (*m*) and under rule 1 of these rules,

"all leases of lands, buildings sites and other immovable properties and rights belonging to a religious institution shall be made by public auction held in the places in which the properties are situate or the rights exist........"

However, the Deputy Commissioner is given power to sanction a variation of the locus of the auction.

In accordance with this provision the 3rd Respondent, trustee, advertised for the holding of a public auction of the lease of the lands now in controversy on 13th May, 1957, and an auction was held in pursuance of that notification in the presence of the Inspector of Endowments on 29th May, 1957. The highest bid fetched was only 2,700 kalams and as this was considered too low the bid was not accepted and a second auction was advertised to be held. This was conducted on 1st June, 1957. But this auction did not show any appreciable increase in the highest bid, the figure remaining at 2,725 kalams. Not being satisfied with the bid and the offer, the trustee held a third auction on 6th June, 1957 also in the presence of the Inspector of the Board where the highest bid was for 2,750 kalams. This compared rather unfavourably with the rent which had been stipulated to be paid by the lessee for the previous 5 year period, which was 3,200 kalams. Unfortunately however, this previous lessee one Ramayya Odayar had defaulted in the payment of rent and the trustee had to take legal proceedings for the recovery of arrears and these suits were defended. Having regard to the relationship between the previous lessee and the trustee, and the manner in which the former had behaved in regard to the lease which he took, the trustee considered and in my opinion reasonably that no one connected with the former trustee should be permitted to take the lease for the period commencing from 1957 and this was a further ground upon which the trustee was not inclined to accept the highest bid of one Thyagaraja Pillai, who had bid at the three auctions held in the presence of the Inspector of the Board. The last of the auctions was on 6th June, 1957, and when this failed to produce a proper lessee the trustee was eager to effect a lease urgently because the agricultural season was approaching and freshes in the river were expected any moment. At that stage, on 9th June, 1957, the petitioner made an offer to the trustee to take the lands on lease for the priod of 5 years at the rental of 2,900

kalams of paddy and payment of the other sums and delivery of the other produce, which I have set out earlier. The trustee considered this a proper offer and being satisfied that the rent stipulated was the best that could in the circumstances be obtained for the temple sanctioned the lease by order dated 14th June, 1957.

Immediately the lease was sanctioned, the petitioner as stated already entered on the property and started cultivation operations. The trustee communicated this lease of the lands to the Deputy Commissioner. Meanwhile on coming to know of the lease having been granted to the petitioner, Thyagaraja Pillai, who was the unsuccessful highest bidder at the three auctions held by the trustee at which he had made bids of 2,700, 2,725 and 2,750 kalams per year, appears to have approached the Deputy Commissioner on 19th June, 1957, with a request that he might be granted the lease offering now 3,201 kalams per year. Thereafter the Deputy Commissioner addressed a communication to the trustee on 3rd July, 1957, informing him that the lease to the petitioner could not be accepted on the ground that the rental was low and instructing him to lease the lands otherwise than by public auction to Thyagaraja Pillai for 3,201 kalams after obtaining sufficient security from him. The trustee did not give effect to these instructions, and thereafter, the Commissioner passed an order on 16th July, 1957, vetoing the lease of the lands to the petitioner. By a further communication dated 19th July, 1957, the Deputy Commissioner directed the trustee to lease out these lands to a co-operative farming society of cultivating tenants which it is understood had not by then been formed.

Before referring to the contentions urged on behalf of the petitioner, it would be necessary to set out a few of the relavant rules on which reliance has been placed on the one side or the other. I have already set out rule 1 of the Rules framed under section 100 (2) (*m*) of the Act under which the trustees of religious in titutions were directed to effect leases by public auction. The two other rules which are relevant in this connection are rules 9 and 10. They run as follows :

"*Rule* 9 (1):—'Leases otherwise than by public auction, shall not be resorted to except with the previous sanction of the Deputy Commissioner. No extension of lease shall be granted without the previous sanction of the Deputy Commissioner.'

Rule 9 (2) : The Deputy Commissioner may, if it is necessary in the best interests of the institution, dispense with the requirement of sub-rule (2) of rule 2."

"*Rule* 10 : All leases stipulating an annual rental of Rs. 500 or more or its equivalent in paddy or other produce shall be reported to the Commissioner who shall have power to veto such leases. If within one month from the date of receipt of the report by the Commissioner, no order vetoing or cancelling the lease is received, the lease shall be deemed to have been approved."

The first contention urged by Mr. Gopalaswami Iyengar, the learned Counsel for the petitioner, was that the Rules under section 100 (2) (*m*) were invalid as being in contravention of section 29 (1) of the Act, which I have extracted earlier. The argument was that section 29 (1) vested in trustees an absolute right to effect leases of immovable property, if the term of lease was 5 years or less, and that the rules which sought to place re triction on this power were inconsistent with such absolute right and were, therefore, invalid. I feel unable to accept this argument. Section 29 (1) does not deal with the manner of leasing and section 100 (2) (*m*) which also I have extracted enables Government to frame Rules as regards the manner in which these leases shall be effected. There can be no doubt that a lease by public auction properly advertised is normally calculated to secure the best rental for the temple, and in these circumstances I am unable to uphold the contention that rule 1. framed under section 100 (2) (*m*) requiring the trustees to effect sales of leases by public auction is not within the rule-making power.

It was next urged by the learned Counsel that under the Rules a lease which would otherwise be voidable or be the subject of a veto by the Commissioner would become confirmed unless the power of veto was exercised within the period of one month specified in the second sentence of rule 10. The following dates are relevant for the

purpose of the application of this rule. The lease in favour of the petitioner was sanctioned on 14th June, 1957. The trustee reported this immediately and the report reached the Commissioner on 16th June, 1957. The Commissioner passed the order now impugned on 16th July, 1957, though it is doubtful whether it was despatched on the same date. From the affidavit in support of the petition it would appear as if it was despatched only on the 17th. But anyway even if it was despatched on the 16th it could not have reached the trustee before the 17th but actually it is stated that it reached him much later. In fact in the counter-affidavit it is stated that

> " even if the order had reached the trustee one or two days later than the due limit of 30 days this circumstance cannot cure the initial infirmity in the lease which is bad in law for want of the previous sanction of the Deputy Commissioner."

The question that I have to consider now is what is the effect of the lapse of 30 days within which the power to veto could be exercised under rule 10.

The contention urged by the learned Additional Government Pleader was that rule 9 (1) imposed an absolute bar on leases otherwise than by public auction, and that such leases were, unless the previous sanction of the Deputy Commissioner had been obtained, *ab initio* void. The argument further ran that even if there was no cancellation the lease never took effect. On the other hand the submission of Mr. Gopalaswami Iyengar was that rules 9 and 10 had to be read together and rule 9 should be read so as to effectuate the purposes for which it was framed. His contention was that rule 9 was directory, and that the failure to obtain the Deputy Commissioner's sanction only made it voidable, and that could properly be a ground upon which it could be vetoed by the Commissioner under rule 10. I see considerable force in the argument of the learned Counsel for the Petitioner, and I accept that as the proper construction of rule 9. Any other interpretation of the same would leave the institution as well as the person who has taken the lands on lease in a state of uncertainty which would act detrimentally to the interests of the institution. It could not be that a person who had entered into a lease in contravention of rule 9—the lease not having been vetoed under rule 10 should be treated as a trespasser and be liable to mesne profits at the suit of the trustee. Nor would it be in the interests of the institution that it should have no right to insist upon the stipulated rental from the lessee in such circumstances. I hold, therefore, that rule 10 applies equally to cases where the terms of rule 9 have not been complied with, and that even in such cases the veto has to be exercised within the period of one month prescribed by rule 10. In this view the order of the Commissioner dated 16th July, 1957, was without jurisdiction and has to be set aside.

In the view that I have taken of the proper construction of these rules it has become unnecessary to consider whether the order of the Commissioner is vitiated by reason of its having been passed with a view to enable the lands to be leased not by public auction, but to a co-operative society of cultivating tenants to be formed. I have already drawn attention to the fact that the Deputy Commissioner has on 19th July, 1957, intimated to the trustee that the lease to the petitioner was cancelled and that in its place he should lease these lands to a co-operative society.

From the communication of the Deputy Commissioner it is clear that he was merely carrying out the directions of the Commissioner and that the impugned order directing the cancellation of the lease was in part at least influenced by the intention to aid the policy of Government to encourage cultivation by co-operative farms. The Court is not concerned with the economic policies of Government, but the matter becomes relevant only for considering whether the direction was given in the sole and exclusive interest of the Trust which it was the duty of the Commissioner to protect. I therefore directed the learned Additional Government Pleader to ascertain from the Commissioner or from the Government whose policy he was implementing, whether either of them could guarantee that the rent which the Co-operative

Society would pay or deliver would be not less than what the 3rd Respondent had agreed to and adjourned the hearing for the purpose. I was however informed that no such guarantee could be given and that the temple should be content to receive the 40 or other percentage of the yield that the law might fix as the share of the landlord.

In these circumstancs, if the reason why the Commissioner exercised his power under rule 10 to cancel the lease granted by the trustee was to have the lands cultivated by a Co-operative Society, a question would arise whether it would be a proper exercise of the power vested in him since admittedly the power to veto had to be exercised solely for the benefit of the institution. But in view however of my conclusion that the order violates the statutory time-limit imposed by rule 10. I am relieved of the necessity of discussing this point any further.

The petition succeeds and the rule *nisi* is made adbolute. There will be no order as to costs.

V.S. —— *Petition allowed.*
Rule nisi *made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

M. Chinniah Servai .. *Petitioner**

v.

The State of Madras represented by the Secretary, Home Department, Fort St. George, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 13—*Power of exemption under—Scope of.*

Section 13 of the Madras Buildings (Lease and Rent Control) Act does not specify the grounds on which an exemption may be granted by the Government. But it is only when the provisions of the Act do not cover a particular case that there is legitimate scope for the exercise by the Government of the powers conferred by section 13.

There is no provision in the Act under which the owner of a non-residential building could apply for eviction of a tenant of such a building on the ground that he *bona fide* requires it for his residential purpose. Apart from cases of non-residential buildings such as factories, large establishments, etc., which could not be normally considered fit for residential purposes, there may be buildngs which may be called non-residential because they were let for non-residential purposes but which could be used for residential purposes as well. There is no provision in the Act under which non-residential buildings of this type could be converted into a residential building, though there is a provision under section 11 (1) of the Act for converting a residential building into a non-residential one. Hence where the justice of any case could not be met by the provisions of the Act there is legitimate scope for the exercise by the Government of the powers conferred under section 13 of the Act.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in G. O. Ms. No. 2621 Home), dated 17th September, 1958, on the file of the Secretary, Home Department, Fort St. George, Madras and published in Part 1, page 1727 of the *Fort St. George Gazette*, Madras, dated 8th October, 1958 and to quash the said order therein.

R. Gopalaswamy Ayyangar and *R. Mathrubutham*, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), *T. Venkatadri* and *V. M. Jayapandian*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is a petition filed under Article 226 of the Constitution for the issue of a writ of *certiorari* or such other suitable writ or order or directions in the nature of writ to quash the proceedings of the State of Madras culminating in their order G.O. Ms. No. 2621, Home, dated 17th September, 1958. In and

*W.P. No. 929 of 1958. 1st October, 1959.
9th Asvina, 1881-Saka.

by that order the Government, in purported exercise of the powers conferred under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, exempted premises No. 15, Coral Merchant Street, George Town, Madras, from the provisions of section 7 of the said Act.

The facts which led up to this petition are as follows : The second respondent in the petition, one Rajathi Ammal, purchased premises Nos. 14 and 15, Coral Merchant Street for a sum of about Rs. 23,000 by a deed of sale, dated 12th March, 1955. Of these two, No. 14 appears to be a cowshed and we are not concerned with it in this petition. No. 15 was in the occupation of the petitioner, Chinniah Servai who was residing in a portion of the premises and running a boarding and lodging house. Rajathi Ammal filed an application before the House Rent Controller, Madras H.R.C. No. 2462 of 1955 for eviction of the petitioner on the ground that she required the premises *bona fide* for her residential purposes and that she had no other house of her own in the City of Madras. The petition was contested on two grounds, namely, (1) that the premises were not required *bona fide* and (2) that the premises were used for a non-residential purpose. The House Rent Controller held that the building in question was a residential building and it was required *bona fide* by the second respondent, who will hereafter be referred to as the respondent. Hence he passed an order for eviction. The petitioner before us filed an appeal against this order, H.R.A. No. 88 of 1956. The Appellate Tribunal dismissed the appeal agreeing with the Rent Controller that the building was a residential one and that it was required *bona fide* by the petitioner for her own occupation. The petitioner filed a Civil Revision Petition No. 1370 of 1956, against this order to this Court. The petition was allowed by Panchapakesa Ayyar, J., who set aside the orders of the two Tribunals below and dismissed the respondent's application for eviction. The learned Judge agreed with the findings of the Rent Controller and the Appellate Tribunal that the respondent did require the premises *bona fide* for her residential purposes but held that the premises were let and were being used for non-residential purposes, namely, running a lodging house and the mere fact that the petitioner lived in a portion of the premises with his family for the purpose of running the lodging house would not convert the premises into a residential one. Thereupon the respondent filed a petition before the Government praying that the said premises No. 15, Coral Merchant Street, Madras, may be exempted from the provisions of section 7 of the Act. The respondent referred to certain statements made by the petitioner before us in prior proceedings for eviction setting up a case that the building in question was residential in character. She reiterated that she required the building *bona fide* for her own residential purposes. Notice of this petition was given to the petitioner before us who made his own representation. Referring to the contradictory statements made by him at different stages the petitioner said that it was true that he had been taking all possible defences open to him under the law to ward off eviction and he could do nothing else than to meet each case as and when it arose. He submitted that no case was made out for exemption. The Government on a consideration of both the respondent's petition and the petitioner's statement passed the following order :—

" Srimathi Rajathi Ammal has applied to Government for exempting premises Numbers 14 and 15, Coral Merchant Street, G.T., Madras, from the operation of the Madras Buildings (Lease and Rent Control) Act. She has stated that she purchased the premises on 12th March, 1955, for a sum of Rs. 22,500. She is now residing in a small portion in premises No. 124, Coral Merchant Street, paying a rent of Rs. 25 per mensem. The building No. 15, Coral Merchant Street, is occupied by Sri Chinniah Servai who is residing there and running a Boarding and Lodging house. Premises No. 14, Coral Merchant Street, is a cowshed. The landlady has represented that she purchased the buildings for high price as she wanted to leave her present rented house as the landlady of that house has been insisting on her vacating the house. She represented that she *bona fide* requires premise No. 15, Coral Merchant Street, for her own occupation. She has therefore requested that the premises may be exempted from the provisions of section 7 of the Madras Buildings (Lease and Rent Control) Act.

The Government have examined the request of the petitioner carefully in consultation with the Accommodation Controller, Madras and they have also gone into the objection statement filed by the tenant Sri Chinniah Servai in detail. The Government find that the landlady has no other house of her own and that her need for this house is *bona fide*. The Government therefore consider that

premises No. 15, Coral Merchant Street, G.T., Madras, may be exempted from the provisions of section 7 of the Madras Buildings (Lease and Rent Control) Act, 1949 ".

It is to quash this order of the Government that the above petition has been filed by the tenant.

Section 13 of the Act runs thus :

"Notwithstanding anything contained in this Act, the State Government may, by notification in the *Fort St. George Gazette*, exempt any building or class of buildings from all or any of the provisions of this Act."

This section does not specify the grounds on which the exemption may be granted by the Government. However, in considering the validity of a provision like this section, this Court, though it held that as such the section was not *ultra vires* or void, nevertheless any particular case of exemption could be the subject of judicial review and this Court would have the power to quash any order of exemption if the order of exemption was arbitrary or *mala fide*. Dealing with the practical aspect of the matter one of us who was a party to the decision in that case *Globe Theatres, Ltd.* v. *State of Madras*[1] said :

"On the one hand, it is obvious that there should exist a power of exemption to be exercised in proper cases. On the other hand, it would be dangerous to vest in the executive unfettered discretion in granting exemptions, a discretion which cannot be challenged in a Court. On the one hand, it is not easy or feasible to enumerate the grounds on which exemption should be made. On the other hand, it would be wrong to allow the Government to exercise the power of exemption on irrelevant or *mala fide* considerations."

It was also observed :

"There are bound to be cases in which an inflexible application of the provisions of the Act may result in unnecessary hardship not contemplated by the Legislature. I would even go further and say that the enforcement of the provisions of the Act may amount to an unreasonable restriction on the exercise of the right conferred by Article 19 of the Constitution. It is eminently desirable that there should be some authority vested with the power to make exceptions to the general application of the Act and its provisions in proper cases. If so, there could be no better body than the State Government, on whom such power could be conferred."

The principles laid down in this decision have been applied in several cases both by learned Judges sitting alone and by Division Benches. Mr. Gopalaswami Ayyangar, learned counsel for the petitioner referred us to the recent decision of this Court in *Abdul Subhan Sahib* v. *State of Madras*[2]. Reference was also made to (195-) 1 M.L.J. N.R.C. 44, Writ Appeal No. 44 of 1956. On behalf of the respondent Mr. T. Venkatadri referred us to the Judgment of Rajagopalan, J., in Writ Petition No. 2 of 1954 and (1959) 2 M.L.J. (N.R.C.) 27.

One of the earliest cases in which the principles laid down by us in the *Globe Theatres*[3], had to be applied to a concrete instance was that in Writ Appeal No. 27 of 1953. In that case the owner of a cinema theatre was prevented from using his own premises to carry on his own business of running a cinema at the instance and for the benefit of a person who was in possession of another theatre in which he was carrying on the same business of running a cinema theatre. There is nothing in the Act which permits the eviction of a tenant in such circumstances, that is, on the ground that the tenant has other business premises in which he can carry on his own business whereas the landlord had none to start his own business. The Government exempted the premises therein from the operation of the Act. Dealing with a challenge of the validity of the order we said as follows :—

"We cannot say that the action of the Government in exempting the premises in question is in any way in disregard of the underlying policy of the House Rent Control Act..... In our opinion, it is only when the provisions of the Rent Control Act do not cover a particular case that there is legitimate scope for the exercise by the Government of the powers conferred by section 13 of the Act. To give an illustration, if in a case the landlord alleges that there has been a sub-letting by the tenant without his permission and therefore the tenant is liable to be evicted and he fails to establish his case before the Rent Controller or the appellate authority, the Government would not be exercising their power of exemption legitimately if on the same ground they grant an exemption under section 13 of the Act. This is not such a case. There is no provision in the Act which permits the eviction of a tenant of

1. (1954) 2 M.L.J. 110
2. (1959) 2 M.L.J. 387.
3. (1954) 2 M.L.J. 110.

business premises on the ground that the tenant has other business premises, whereas the landlord has none to start his own business. In such a case, the Government may consider that an eviction of the tenant is not only not unreasonable but is most equitable. This is such a case....."

We, therefore, upheld the order of exemption passed by the Government in that case. In Writ Petition 2 of 1954 Rajagopalan, J., upheld the order of exemption passed by the Government following the principles laid down in the *Globe Theatres, case*,[1] and Writ Appeal No. 27 of 1953. It was contended before the learned Judge that the statutory tribunals had decided against the landlord and the order of the Government was designed to reverse the order of the tribunals and on the same material placed before the tribunals. But the learned Judge did not agree with that contention. He certainly subscribed to the proposition that if the Government exempted the premises from the provisions of the Act on the very same grounds it will in effect amount to a reversal of the appellate authority though in an indirect way and an order passed in such circumstances would be in excess of jurisdiction. It is this latter aspect which compelled this Court to set aside the order of exemption in *Abdul Subhan Sahib* v. *State of Madras*[2].

Bearing in mind these general principles the facts of this case may be examined. Both the Rent Controller and the Appellate Tribunal had held that the building in question was *bona fide* required by the respondent for her residential purposes. This finding was expressly accepted by Panchapakesa Ayyar, J., in C.R.P. No. 1370 of 1956. In spite of this finding the learned Judge felt compelled to dismiss the application for eviction because he held that the building was non-residential. Now there is no provision in the Act under which the owner of a non-residential building can apply for the eviction of a tenant of such a building on the ground that he *bona fide* requires it for his residential purposes. There may be non-residential buildings of various types. There may be buildings like factories, large industrial establishments, shops and other such buildings which obviously could not be normally considered to be fit for residential purposes. There may be equally buildings which may be held to be non-residential because they were let out for non-residential purposes but which certainly could be used for residential purposes. The building with which we are concerned in this petition obviously falls in the latter category. The finding is that the petitioner himself lives with his family in a portion of the house and uses the remaining portion of the house to run his boarding and lodging business. In that sense any building with half a dozen rooms can be used to run a boarding and lodging house. It cannot possibly be contended in this case that if the petitioner were to vacate, the building could not be used entirely for residential purposes. The difficulty however was that there is no provision in the Act under which a non-residential building, that is to say, a building which has been let for non-residential purposes, can be converted into a residential building, though there is a provision in section 11 (1) of the Act for conversion of a residential building into a non-residential building with the permission in writing of the Controller. The position in this case was therefore this. The respondent had purchased the house for her own residential purposes. It was not suggested anywhere that the house did not permit residential occupation. The finding of this Court which had become final—and it is binding on all parties—was that the building must be deemed to be a non-residential. There is no provision in the Act under which the owner of a non-residential building can demand eviction of the tenant of such a building for her own *bona fide* residential occupation. The Government in our opinion did not purport to set aside the finding of this Court that the building was non-residential in character. What they were impressed by was the *bona fide* requirement of the building by the respondent for her residential purposes. As to this, both the Rent Controller and the Appellate Tribunal and this Court have been concurrently of opinion that the respondent's case was *bona fide*. Here then was a case the justice of which could not be met by any of the provisions of the Act. Here is an instance of the principle which was laid down in Writ Appeal No, 27 of 1953 as following from the general principle set out in *Globe Theatres Ltd* v. *State of Madras*[1], namely, that

1. (1954) 2 M.L.J. 110. 2. (1959) 2 M.L.J. 387.

it is only when the provisions of the Rent Control Act did not cover a particular case, that there is legitimate scope for the exercise by the Government of the powers conferred by section 13 of the Act. We therefore hold that the order of exemption passed by the Government in this case was not either arbitrary or *mala fide* nor did it amount to a circumventing of an order of this Court or of any Rent Control Tribunal.

We have refrained from making any reference to the inconsistent statements made by the petitioner from time to time because the Government did not purport to set aside the finding of this Court that the building was non-residential in character relying upon such prior statements of the petitioner.

The petition is therefore dismissed but in the circumstances there will be no order as to costs. The petitioner undertakes to give vacant possession within six weeks from to-day.

In view of the dismissal of the Writ Petition, C.M.Ps. Nos. 5530, 5531 and 5532 of 1959 are dismissed.

R.M. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. National Traders, a firm of Merchants, carrying on business in Partnership and the partners are P. V. Venkateswarlu and others .. *Appellants**

v.

Messrs. Hindustan Soap Works, a firm of Merchants, having their office at Erode .. *Respondents.*

Sale of Goods Act (III of 1930), sections 15 and 16—Scope—Applicable to sale of specific goods also—Implied conditions as regards description and merchantable quality—Rights of buyer who had accepted the goods—Suit for damages on warranty—Measure of damages.

Sections 15 and 16 of the Sale of Goods Act are not restricted to sales of unascertained goods. The Proviso to section 16 (2) implies that a sale of specific goods is within the terms of the section. But there may be cases in which specific goods may be agreed to be bought as such without any description or with a description to which the parties attached no significance. It is therefore a question of construction of a contract of sale in any particular case to find out whether it is a sale by description. It cannot be said that the sale in the present case being one of specific goods cannot for that reason be deemed to be a sale by description.

The description in the contract about the goods being '5 tons of Caustic Soda solid No. 97/98 U.S.A. origin' is a description regarding its quality, fitness and place of origin and is necessary for the identification of what the buyer agreed to buy and the sale though of specific goods was one by description as well.

Under section 15 if there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. Under section 16 (2) there is a further implied condition where there had been no previous inspection by the buyer, that the goods are of merchantable quality.

The effect of these two conditions is to give a right to the buyer to reject the goods in case what was tendered did not answer the description or was not of merchantable quality and sue for the price if he had paid the price. It is also open to the buyer to accept the goods and sue on the basis of warranty for damages.

The fact that the buyer paid the price to the seller and the unexplained delay in complaining about the defect in the goods would clearly show that they had accepted the goods.

Where the buyer accepts the goods he has to pay the contract price minus any claim for the breach of warranty. The measure of damages in such a case is the difference between the value of the goods as delivered and their value if it answered the contract description.

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* Letters Patent Appeal No. 41 of 1955. 10th April, 1958. (20th Chaitra, 1880—Saka).

Appeal under Clause 16 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Basheer Ahmed Sayeed dated 16th December, 1954 and passed in C.C.C.A. No. 93 of 1952 (preferred to the High Court against the Decree of the City Civil Court, Madras, dated 24th December, 1951 and passed in O.S. No. 1051 of 1949).

Rama Prasada Rao, for *Messrs. John and Row*, for Appellant.

P. S. Chandrasekhara Ayyar, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal arises under clause 15 of the Letters Patent from the judgment of Basheer Ahmed Sayeed J., in C.C.C.A. No. 93 of 1952 at the instance of the plaintiff. That appeal arose out of a suit filed by the appellant for the refund of Rs. 2,976-8-0 being the price paid in respect of 5 tons of caustic soda sold to him by the respondent with interest theron. The appellant is a firm of merchants carrying on business at Madras. The respondent is carrying on business at Erode, Coimbatore District, under the name of "Hindustan Soap Works". The respondent had entered into a contract for the supply of "5 tons of caustic soda Solid No. 97/98 U.S.A. origin" with Messrs. Alfred Mackenzie & Co., Ltd., Madras. The goods had arrived at the Madras harbour on the 7th January, 1949 and were stocked in the godown of Messrs. Alfred Mackenzie & Company. On the 11th of January, 1949 the appellant entered into a contract with the respondent for the purchase of the aforesaid goods at Rs. 28-12-0 per cwt. On 21st January, 1949 the appellant paid the price and sought delivery of the goods but Messrs. Alfred Mackenzie & Company however refused to give delivery as some moneys were due to them from the respondent. The respondent paid those moneys immediately ane enabled the appellant to take delivery of the goods. The appellant however became inactive and on 12th February, 1949, they wrote to the respondent saying that when they went to take delivery of the goods they found that the goods were "not fit for usage or resale as the drums in which they were packed were old and extremely damaged". They insisted that they should be given new stock or a refund of the price paid. The respondent promptly repudiated the claim stating that the contract was entered into by the appellant after an inspection of the goods. Further correspondence only led to the suit. In the meanwhile Messrs. Alfred Mackenzie & Co., who were having custody of the goods sent notices to the parties and failing to get any response sold the goods on 26th September, 1949 and realised a sum of Rs. 1157-2-3. Out of that sum they adjusted a sum of Rs. 362-15-0 towards their dues for rent of the goodown and the expenses of re-sale. Subsequently Messrs. Alfred Mackenzie & Company, Limited, appears to have gone into liquidation and the sum realised from the sale was taken over by the Official Liquidator. A few days before the sale the appellant filed the suit out of which this appeal arises for a refund of the price paid by them on the ground that the goods did not answer the description under which they were sold and were not of merchantable quality. The respondent contested the claim and stated that the appellant had inspection of the goods before they entered into the contract and that he did not make any representation regarding the quality of the goods or the nature of the packing and that the sale of the goods was not a sale by description and that the default in not taking delivery of the goods was with the appellant. The learned City Civil Judge framed substantially two issues, namely, (1) as to which of the parties committed a breach of the contract and (2) whether the appellant was entitled to the return of the price. Evidence both oral and documentary was let in and the learned Judge came to the conclusion that the appellant did not have inspection of the goods before they entered into the contract of sale and that the sale was by description and that the appellant having rejected the goods in time was entitled to the return of the price paid. He also held that the respondent was guilty of the breach of contract. In that view he passed a decree for the amount claimed with subsequent interest and costs.

On appeal by the respondent, Basheer Ahmed Sayeed, J., accepted the finding that the appellant did not have inspection of the goods before entering into the bargain but held that inspection was made before the price was paid. The learned Judge also held that the appellant failed to make out that the goods were of a different quality than that contracted for and that as the sale was of specific goods, the appellant was not entitled to reject the goods on the ground of their not satisfying the description. For the same reason and for the further reason that the respondent was not a person dealing in such goods the learned Judge rejected the case based on absence of merchantable quality in the goods tendered. In the result the appeal was allowed and the suit dismissed with costs throughout.

The appellant aggrieved by the judgment of the learned Judge has filed this Appeal. Before proceeding with the substantial question involved in the appeal there are three questions of fact which have to be disposed of. The learned Judge held that the appellant had failed to prove the defective nature of the goods that were offered for delivery. We are unable to find from the records whether this matter was ever the subject of serious dispute between the parties. The appellant claimed in their plaint that the goods were not of a merchantable quality. There was but a vague denial of that averment in the written statement. In Exhibit A-5, a letter written by the appellant to the respondents on 12th February, 1949, it was specifically stated that 5 tons of caustic soda shown to them were " not fit for usage or for re-sale and the drums were deteriorated and damaged ". There was no denial of this statement as to the condition of the goods in the reply of the respondents under Exhibit A-6 dated 14th February, 1949. The case of the respondents during the correspondence that ensued and also during the trial of the suit was that the appellant bargained for the sale of specific goods after inspection. P.W. 1 one of the partners of the appellant firm stated in his examination-in-chief that the drums were damaged, the containers were not sound, and the caustic soda having been exposed to air became watery. There was no cross-examination of this evidence and there was no attempt on the part of D.W. 1 the proprietor of the respondent firm, to deny that statement in his evidence. If really the goods were of the description contracted for we fail to see why the appellant having paid the price in full should desist from taking delivery particularly when there is no evidence that the market had gone down. We hold that the appellant has proved that the goods that were tendered for delivery did not answer the description contracted for and were not of a merchantable quality.

The learned Judge also held that the respondent was not a person who deals in goods of the description sold. Here again we must point out that this was not the subject of controversy at any stage of the proceedings. The respondent was stated to be merchants manufacturing soaps. It is well-known that for the manufacture of soaps caustic soda is essential. It is not stated in the evidence that the respondent was not dealing in caustic soda which soap manufacturers generally purchase in bulk and that the suit transaction was a solitary one by him. Reliance is placed by the learned Advocate for the respondent on a passage at page 636 of Benjamin on Sale citing a case in *Burnby* v. *Bollett*[1]. There a buyer bought a pig from a butcher who himself had bought it just then. The meat of the pig turned out to be diseased and in action against the butcher it was held that the defendant was not a dealer in meat and that he did not know that it was unfit for food. This case proceeded upon the distinction between the defendant being a dealer of meat and a dealer of the pig. The defendant was held not to be a dealer in meat though he might have sold the pig. On that ground and also for the reason that the buyer relied on his own judgment in purchasing the pig the claim was rejected. That case in our opinion cannot be relied on as an authority on a matter which is essentially a question of fact, namely, whether the seller is a dealer within the terms of section 16 (2) of the Sale of Goods Act in a particular case. We hold that in the present case the respondent was a dealer in caustic soda.

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1. 16 M. and W. 644.

The next question is whether the goods that were sold to the appellant were specific goods and whether the buyer had inspection before he entered into the contract for the purchase of the same. Exhibit A-2 which refers to the contract between the parties states that it was for the supply of " our 5 tons of caustic soda bought from Messrs. Alfred Mackenzie & Co., Limited, Madras ". This evidently refers to the contract under Exhibit A-1 which the respondent made with Messrs. Alfred Mackenzie & Co. That was for the purchase of ' 5 tons of caustic soda solid No. 97/98 U.S.A. origin.' Goods answering the description in this contract in Exhibit A-1 had admittedly been received by Messrs. Alfred Mackenzie & Co., on 7th January, 1957 and were kept in their godown at the Madras Harbour. When therefore the appellant entered into an agreement to purchase those 5 tons of caustic soda the agreement was for for the purchase of specific goods. Although the plea of the respondent was that the buyer had inspection before the contract he was not able to let in any evidence regarding the same. The learned Judge has found that the contract was for the sale of specific goods and that the appellant had no inspection of the same prior to the contract though he had such inspection before he paid the price. We entirely agree with him.

The question then for consideration is whether the goods were sold by description. The expression description usually means a particular class of goods. It also includes the statement which may be essential to the identity of the goods as contracted, for *e.g.*, as to quality or fitness, place of origin, or of shipment, time of despatch or delivery, mode of packing, etc. (*Vide* 26 Halsbury). In the present case the sale of 5 tons of " Caustic Soda Solid No. 97/98 U.S.A. origin" is descriptive of the article and would be essential for the identification of the goods. It is no doubt true that the caustic soda was packed in certain drums and they were specific goods within the meaning of section 2 (14) of the Indian Sale of Goods Act. But what was agreed to be sold and paid for was not the drums nor any caustic soda contained in the drums as such, but the caustic soda of the specifications stated to be contained in the drums. Therefore for a proper identity of the goods it was essential to have the description. The learned Judge has held that the sale being of specific goods could not be held to be a sale by description and in support of that statement of the law he has relied on a passage in 29 Halsbury, page 19 Note (*n*) which states as follows :—

> "Specific goods must be distinguished from unascertained or generic goods, that is, goods defined only by description. It follows from the definition that under a contract for the sale of specific goods, the seller does not fulfil his contract by delivering any goods other than those agreed upon ; under a contract for generic goods, the seller may deliver any goods which anwser to the description. In border-line cases it is not always easy to distinguish between specific and unascertained or generic goods."

The distinction sought to be made in the particular passage cited is as between specific goods and unascertained goods and not between specific goods and goods sold by description. One attribute or perhaps the main attribute in the sale of unascertained or future goods is that they are contracted for by description. But that does not lead to the inference that specific goods cannot be sold by description. In 29 Halsbury, page 62, it is stated :

> " Goods are sold by description where the buyer enters into the contract of sale in reliance on the description of the goods given by or on behalf of the seller. There may be a sale by description although the goods are specific."

In Benjamin on Sale (8th edition), page 609, referring to section 13 of the English Sale of Goods Act corresponding to section 15 of the Indian Sale of Goods Act it is stated :

> " The rule applies to a contract for the sale by description either of a specific chattel or unascertained goods."

Again at page 646 the law is stated with reference to section 14 (2) of the English Act corresponding to 16 (2) of the Indian Act thus :

> "It will be observed that there are no words in section 14 (2) to confine its operation to unascertained or future goods. Indeed the fact that the sub-section contemplates the possibility of the goods having been actually examined shows that the specific goods are not excluded."

In Mulla's commentary on the Indian Sale of Goods Act it is stated at page 62 :

> " Specific goods may, however, be sold by description, and it is conceived that, when this is the case, such stipulations will, as in the case of the sale of unascertained goods, amount to conditions though the goods are specific, and the provision relating to the sale of specific goods, whatever its precise effect will only apply to those cases in which the buyer does not rely upon the description."

Again at page 70 it is stated under the heading " Sale of specific goods by description " as follows :—

> "This usually applies to a contract for the sale of unascertained or future goods, but it may apply to the sale of specific goods also, if the buyer contracts in reliance of that description ".

In *Grant* v. *Australian Knitting Mills, Ltd.*[1], the Privy Council observed as follows :

> " It may also be pointed out that there is a sale by description even though a buyer is buying something displayed before him at a counter ; a thing is sold by description, though it is specific, so long as it is sold not merely as a specific thing but as a thing corresponding to a description ".

The decision in *Varley* v. *Whipp*[2], related to a case of sale of a specific article. There the plaintiff agreed to sell to the defendant a reaping machine which the latter had never seen and which the plaintiff stated to have been new, to have been used to cut only about fifty or sixy acres. The machine was then delivered in pursuance of the contract of sale and the defendant rejected the article complaining that it did not correspond with the description. It was held that the sale was one by description. At page 516 Justice Channel observed :

> " The term ' sale of goods by description ' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. . . . The most usual application of that section (referring to section 13 of the English Act) no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description. . . The earliest date therefore at which the property could be said to pass would be when the machine was accepted by the purchaser."

In regard to unascertained or future goods it is invariably the case that the sales are by description. That does not however mean that in regard to specific goods the sale is not by description. Section 15 and section 16 of the Indian Sale of Goods Act are not restricted to sales of unascertained goods. The Proviso to section 16(2) implies that a sale of specific goods was within the terms of the section. But there may be cases in which specific goods may be agreed to be bought as such without any description or with a description to which the parties attached no significance. It is therefore a question of the construction of a contract of sale in any particular case to find out whether it is a sale by description. We cannot therefore agree with the learned Judge that the sale in the present case being one of specific goods cannot for that reason be deemed to be a sale by description. In our opinion the description in the contract about the goods being "solid 97/98 U.S.A. origin" is a description regarding its quality, fitness and place of origin and is necessary for the identification of what the appellant agreed to buy and the sale though of specific goods was one by description as well.

The sale being thus of specific goods by description of which the buyer had no inspection before he entered into the contract of sale, the point as to the respective rights of the parties then arises for consideration. In *Jones* v. *Just*[3], it was held that in every contract to supply goods of a specified description, which the buyer had no opportunity to inspect, the goods must not only answer the description but must be saleable or merchantable under that description. Those two conditions, namely, (1) answering the description in the contract and (2) merchantable quality are embodied in sections 15 and 16 of the Indian Sale of Goods Act. Section 15 runs as follows :

> " Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ".

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1. (1935) 70 M.L.J. 513 (525).
2. L.R. (1900) 1 Q.B.D. 513.
3. (1868) L.R. 3 Q.B. 197.

Section 16 with reference to sub-clause (2) runs as follows :

"Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :...... .

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality : Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

These sections were based upon the English Act of 1893. The basis of the rule that the goods should answer the description is really that the buyer should get what he contracted for, and that it woud not be a proper performance of the contract to give the article not answering the description in the contract. Both the Indian and English enactment restate the law contained in *Jones* v. *Just*[1], in regard to the merchantable quality except that under the statute actual inspection and not a mere opportunity to inspect is necessary before the buyer can lose the benefit of the condition as to the merchantable quality. There are therefore two conditions to the contract of a sale by description even though of specific goods. First the goods tendered should answer the description and (2) unless there was previous inspection they should be of merchantable quality. In *Wallis, Son & Wells* v. *Pratt & Haynes*[2], the oil seeds known as "common English Sainfoin" were sold with a condition that the sellers gave no warranty expressed or implied as to growth, description or any other matters. The seed that was actually delivered to the buyer was not "common English Sainfoin" but "giant sainfoin' a different and inferior seed. The buyer accepted the goods and sued for damages for breach of warranty. The House of Lords held that they were entitled to the damages as the description was a condition going to root of the contract and not a mere warranty. The remedy for the breach of the condition in the circumstances that ensued in that case was on the basis of a breach of warranty. Lord Loreburn, Lord Chancellor, stated the law thus at page 395 :

"if a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it ; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio* but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty."

Section 12 of the Indian Sale of Goods Act defines a condition and warranty. Section 12 (2) and (3) state :

"(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

As already stated, under section 15 if there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description under section 16 (2); there is a further implied condition where there had been no previous inspection by the buyer, that the goods are of merchantable quality. The effect of these two conditions is to give a right or an occasion to the buyer to reject the goods in case what was tendered did not answer the description or was not of merchantable quality. The passing of property in the goods is not the test as to the applicability of this right. If the goods do not conform to the description there is no performance of the contract at all. If the goods are not of the merchantable quality the thing for which the buyer bargained for was not given. In either case the default of the seller goes to the root of the transaction and therefore the occasion would arise to the buyer to reject the goods and sue for the price

1. (1868) L.R. 3 Q.B. 197.

2. L.R. (1911) Appeal Cases 395.

if he had paid the price. It was also open to the buyer to accept the goods and sue on the basis of a warranty. Section 59 of the Indian Sale of Goods Act states thus :

> "Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods ; but he may (*b*) sue the seller for damages for breach of warranty."

The remedy of a buyer where he has accepted the goods is only to sue for damages. As to when a buyer is deemed to have accepted the goods is provided for by section 42 which runs thus :

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them".

It therefore remains to consider whether the appellant is entitled to reject the goods and sue for the price as he has done, or whether he has precluded himself from so doing by accepting the goods. We have already held that although the appellant did not have inspection of the goods before the contract was entered into they did have such inspection before the price was paid. The fact that the appellant paid the price to the respondent after such inspection and the unexplained delay thereafter in complaining about the defect in the goods would clearly show that they had accepted the goods. The appellant having accepted the goods regardless of the breach of the conditions as to the description and quality precluded themselves from rejecting the goods and suing for a refund of the price. They can however treat the breach as one of warranty and sue for damages. The law on the subject has been considered in a recent judgment in *Sha Trilokchand* v. *Crystal & Co.*[1], where it was held that where goods not answering the description contracted for are delivered to a buyer he has a right to one of two alternative remedies : (*a*) that of rejecting the goods and obtaining a refund of price and also suing for damages for non-delivery. (*b*) waiving the condition and accepting the goods and suing for damages for breach of warranty. In the case where he accepts the goods he has to pay the contract price minus any claim for the breach of warranty. The measure of damages in such a case is the difference between the value of the goods as delivered and their value if it answered to contract description. The appellant in the present case having accepted the goods would be entitled only to a remedy by way of damages namely the difference between the price of the goods contracted for and the price of the goods actually delivered. The suit was however laid for the return of the purchase money and not on the basis of a breach of warranty. It is in evidence however that at no time after the 11th of January, 1949 was caustic soda selling below Rs. 28-12-0 per cwt. (*Vide* evidence of P.W. 2) That being so, the market rate of that quality of goods contracted for on the material date would not have been less that that amount. The price fetched by the sale by Messrs. Alfred Mackenzie and Company on 26th September, 1949 was Rs. 1157-2-3. It is not stated that there was any reduction in the market rate from 11th January, 1949 to 26th September, 1949 or that the price fetched in the resale was low. The sum of Rs. 1157-2-3 would therefore represent the price of that quality which was tendered to the appellant. The difference therefore between the contract price of Rs. 2875 and the resale price of Rs. 1157-2-3 would represent the damages sustained by the appellant by reason of the breach of warranty. We consider that in the circumstances of the case it is not necessary to relegate the plaintiff to separate suit or to have the suit remanded for fresh trial after making appropriate amendments to the pleadings, on the question as to the quantum of damages. We hold that the appellant would be entitled to recover this sum from the respondent. As stated already out of this sum of Rs. 1157-2-3 realised by the sale, a sum of Rs. 362-15-0 was deducted by Messrs. Alfred Mackenzie and Company as godown rent and expenses for resale. These charges were occasioned by the default of the appellant and should therefore be borne by them. The balance of the amount is said to be with the official liquidator in the winding up proceedings

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1. (1955) 1 M.L.J. 494.

of Alfred E. Mackenzie and Company Limited. The learned Judge has directed that the appellant may take from the Official Liquidator the amount which represents the sale of the goods purchased by the plaintiff. As the property in the goods belonged to the appellant we agree with the learned Judge that the appellant would be entitled to that money. In addition they will be entitled to the damages of Rs. 1717-13-9 together with interest thereon at 6 per cent. per annum from December 24, 1951, the date of the decree of the trial Court till payment and we decree that the respondent shall pay the same to the appellant. The appeal is allowed to the extent mentioned above. As the appellant has succeeded on the basis of a claim which he did not put forward in the Lower Court, there will be no orders as to costs in any of the Courts.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

The Madras Motor Insurance Co., Ltd., Madras .. *Appellant**

v.

Mohamed Mustafa Badsha and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 96—Liability to Insurance Company—Owner of car parting with it to another—Policy if lapses—Accident occurring after parting with the vehicle but before transfer of ownership to another—Liability of Insurance Company.

In view of the specific provision in section 96 of the Motor Vehicles Act it cannot be contended that a policy of insurance lapses the moment the insured parts with the ownership of the vehicle. Even if the insurer has any ground which would entitle him to avoid the policy as against the insured, the insurer cannot escape the liability to pay the victim of an accident so long as the policy is current and valid. Sale of the vehicle is not a ground under the section to avoid a policy of insurance. Hence where the owner of a vehicle which is insured under the Act against the third party risks sells the same to another but transfer of ownership or transfer of the policy has not yet taken place, and an accident occurs the insurance company cannot escape its liability under the policy.

Appeal against the decree of the City Civil Court of Madras, in O.S. No. 1190 of 1955 (High Court C.S. No. 35 of 1952).

R. Gopalaswami Ayyangar and *M. Sundaran*, for Appellant.

C. R. Krishna Rao and *Md. Habiballa*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Madras Motor Insurance Co., Ltd., defendant 4, in an action in the Court below for damages for rash and negligent driving of a motor car, which caused a very grave accident, killing the son of the two plaintiffs, by name Mohamed Mohideen. The appellant Company apparently came into the suit as the insurer, to whom notice of the proceedings was given, and who was entitled to be made a party and to defend the action, within the scope of section 96 (2) of the Motor Vehicles Act (IV of 1939). The main defence of the appellant Company is this. The concerned vehicle (MSZ 2556) belonged to defendant 1 (Sukumar Productions) and was covered by an insurance policy with the appellant-Company, as well as by the certificate of registration in the name of the owner as required by the rules. The accident was on 13th January, 1951 at about 3 P.M. The first defendant contended in the suit that he sold this motor car to defendant 2, one Sri N. Ramakrishnan, even on 8th January, 1951, and that he also delivered the car to the transferee earlier, as well as the C Certificate, the insurance policy and other documents. The person who actually drove the vehicle at the time of the accident, one Rajagopalan (Defendant 3) was in the employment of defendant 2, and not a person employed by defendant 1. The appellant-Company affirms these facts, and maintains that, since the ownership of the car was transferred by the insured prior to the date of the accident, the insurable interest in the

* C.C.C. Appeal No. 88 of 1957. 18th February, 1960.
(29th day of Magha, 1881, Saka.)

policy thereby disappeared, so that, in legal effect, the policy must be construed as having lapsed on the date of the accident. It is admitted that (1) the policy had to run for a considerable period further (upto August of that year), before it was due for renewal by another policy with the appellant or some other company, and (2) that the alleged transferee, defendant 2, applied for transfer of the insurance policy in his name only some days after the accident. In other words, it is not in dispute by the appellant that, on the date of the accident, the policy was valid and current *ex facie*, that it stood in the name of defendant 1 as the insured, and that there had been no transfer of insurance. Nevertheless, learned counsel for the appellant urges before me, mainly upon the strength of certain English authorities to which I shall refer later, that the disappearance of the insurable interest in the policy by virtue of the transfer amounts to a lapse. It is argued that, consequently the third party who sustained the injury cannot claim damages from the Insurance Company.

The learned Judge who tried the suit went into the merits of evidence whether, in actual fact, the vehicle had been transferred from defendant 1 to defendant 2 on 8th January, 1951, even prior to the accident. I may here conveniently state that the facts of the accident itself are not in dispute or the fact that the driving of the vehicle on that occasion was rash and negligent, and that it resulted in the death of the son of the plaintiffs, aged about 13, entitling the plaintiffs to claim for heavy damages. The learned Judge came to the conclusion that, for want of sufficient evidence, he could not hold that the sale was established. He therefore held that the facts amounted to the ownership vesting in defendant 1 alone on the date of the accident.

Learned counsel for the Company, Sri R. Gopalaswami Ayyangar, argues that this conclusion of the learned Judge is opposed to certain facts of the documentary record, such as the receipt, dated 8th January, 1951 (Exhibit B-4) issued by Sukumar Productions to N. Ramakrishnan (defendant 2) etc. However, the receipt does not appear to have been properly proved, and the learned Judge felt some difficulty in accepting and acting upon it. But, for purposes of the present argument, I shall assume that the car was actually sold on that date, and that defendant 2 became the owner of the car on that date, as far as defendants 1 and 2 were concerned. Even so, it is not in dispute that, from the point of view of the State Authorities, the certificate of registration still stood in the name of defendant 1 on the date of the accident, and that the insurance policy was current and valid in the name of defendant 1 as the insured. The question is whether, under those circumstances the Insurance Company can plead that there is a virtual lapse of the policy, thereby entitling the company to claim exemption from payment of damages to the third party who suffered the injury.

Whatever the English authorities might be on this aspect, this argument by the Company is directly opposed to the very terms of the policy, and to the law in this country. I have scrutinised the terms of the policy and, while I am able to discover there specified conditions, the breach of which will render the policy liable to be cancelled, such as those set forth in section 96 (2) (*b*) (i), etc., of the Madras Motor Vehicles Act, there is absolutely no condition to the effect that a sale of the car during the validity of the policy renders the policy void, or amounts to a lapse. Even assuming that such a sale is a term which enables the insurer to claim as against the insured, and that the policy is liable to be avoided or cancelled, which is the highest that the Insurance Company can claim, the law in this country makes it clear that this will not avail the Company with regard to liability for damages to the victim of the accident. It is for this specific purpose that the Legislature has enacted section 96 (1) of the Motor Vehicles Act, and it is explicitly stated there that.

"notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor".

Again, in section 96 (2) itself, those conditions are specified, the infringement of which might entitle an insurer to avoid a policy. Undoubtedly, a transfer of the

vehicle during the currency of a policy has nothing to do with these conditions. It is also interesting to note, in this context, that the Supreme Court has recently held in *B. I. G. Insurance Co* v. *Itbar Singh*[1], that the statute has expressly confined the right of the insurer to avoid his liability to certain grounds, and that the Court cannot add to those grounds for reasons of hardship. Their Lordships actually observed that, even if the insurer finds that the insured is a man of straw, and is thereby frustrated with regard to his remedies, " the loss had to fall on some one, and the statute has thought fit that it shall be borne by the insurer ". The law in this country is therefore very clearly that, even if the insurer has some ground which would entitle him, as against the insured, to avoid the policy or to have it declared as void, that will not protect the insurer from liability to pay the victim of the accident to the extent covered by the insurance. Nor is this unreasonable? It is a necessary and logical implication of the entire theory of compulsory insurance in respect of third-party risks with reference to motor vehicles. Any alternative view would involve the difficulty which would result in the injustice that the third parties, who may be injured by such accidents, may be unable to obtain the benefit of the compulsory insurance, under a variety of unforseeable circumstances such as the transfer of property in the vehicle, or the death of the insured resulting in an immediate devolution of title by operation of law, etc. Clearly, it is in order to obviate these obstacles to the remedy of the third party victims, that section 96 was enacted by the Legislature.

It is argued that the law in England appears to be somewhat different, mainly upon the strength of certain passages in Shawcross on Motor Insurance, 2nd edition, pages 85 and 87. In page 85, the learned authors point out, on the strength of a line of cases in United Kingdom that, where the subject-matter of policy is a specified vehicle the policy lapses if the assured parts with his interest in the vehicle (see also *Peters* v. *General Accident and Life Assurance Corporation Ltd.*[2].) But, I note, that in the relevant insurance policy, there seems to have been an express condition that the policy was liable to lapse, if the assured parted with property in the car. In the decision quoted, Goddard, J., as he then was, expressed the view that, because of the transfer of property in the car, " the policy lapsed". Now, we have no such term in the present policy, and it is at least doubtful in view of section 96 (2) and the Supreme Court decision referred above, whether any such term could be legally imported into motor insurance policies, thereby entitling the insurer to avoid the policy, as a result of the sale of the car. In any event, this may be as between the assurer and the assured. But the right of the third party to claim the benefit of the decree has been put on a higher footing, and statutorily provided for in this country.

In the result, therefore, I hold that the decree of the lower Court was perfectly justified, even upon the basis (which was not proved, as I earlier observed) that the insured had sold the car to another prior to the date of the accident. I make no observations here upon the right of the appellant-Company to pursue any remedies against the original insured (defendant 1) or the transferee (defendant 2) or both. It may be pertinent here to observe that, whether the driver in actual charge of the vehicle was employed by defendant 1 or defendant 2, defendant 1 should certainly be held to have permitted such employment, since defendant 1 was responsible for the car till the certificate of registration was transferred, as well as the insurance policy. It is no doubt true that there would be a substantial difference in law if the driver had been an unqualified or unlicenced person. But that is not the case here. The appeal hence fails, and is dismissed with costs.

R.M. *Appeal dismissed.*

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1. (1960) S.C.J. 44 : (1960) 1 An.W.R. (S.C.) 6 : (1960) 1 M.L.J. (S.C.) 6 : A.I.R. 1959) S.C. 1331. at 1335.
2. (1937) 4 All E.R. 628.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

P. Govinda Chetty and others .. *Appellants**

v.

K. Lingaswami Chetty and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 58 *and* 62 (1)—*Framing a scheme for the institution—Deputy Commissioners not satisfied that a scheme should be framed—Order dropping the proceedings—Suit to set aside the order—Court has no power to direct a scheme to be framed.*

Under section 58 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) the Deputy Commissioner has to be satisfied that it is necessary or desirable to frame a scheme of administration for the institution.

The statute provides a remedy by way of suit where this subjective satisfaction exists and the authorities proceed further to frame a scheme, or alter, modify or cancel it. But the failure of the authority to be satisfied is not a justiciable matter.

While the power to institute a suit against the order of the Commissioner may not be in dispute, the Court has no power to direct the Deputy Commissioner to be satisfied that a scheme should be framed or to direct him to frame a scheme where the Deputy Commissioner was not so satisfied originally.

Appeal against the Decree of the City Civil Court (II Assistant Judge) Madras, in O.S. No. 2776 of 1955 and petition praying to admit documents as additional evidence.

K. E. Rajagopalachari, for Appellants.

T. A. Ramaswami Reddi, R. Venkataramani, The Government Pleader *K. Veerasami* and *V. Srinivasan,* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal involves an interesting question relating to the provisions of the Hindu Religious and Charitable Endowments Act, Madras Act XIX of 1951. We are not concerned here with most of the particulars of evidence, but we may briefly note that one Rukmani Ammal endowed certain properties by a registered settlement deed, dated 19th March, 1906, for the celebration of a certain festival in the month of Thai in Sri Veeraraghavaswami Temple at Trivellore. She appointed six persons as executors, directed them to collect rents and to hand over the rents to two of the executors for the administration of the endowment. It is alleged that the properties have since come into the possession of the first defendant, who is misappropriating the rentals, and not administering the religious trust in a proper manner.

The matter came to the notice of the Deputy Commissioner of Religious Endowments, Coimbatore, who initiated proceedings *suo motu* under section 58 (1) of Act XIX of 1951. But as that officer was not satisfied that a scheme should be settled for this religious trust, he dropped the proceedings. The matter again came up before the Commissioner of Hindu Religious and Charitable Endowments, who also declined to interfere. It is sufficient to note that under section 61 (1) of Act XIX of 1951, there is a right of appeal provided to the Commissioner against any order by the Deputy Commissioner under the prior provisions, and that under section 62 (1) of the Act, any party aggrieved by an order passed by the Commissioner may within the period of limitation specified, institute a suit in a civil Court to modify or cancel such order. The present suit has been instituted upon this basis, and the question is whether the suit is maintainable ; and whether the Civil Court can frame any scheme.

The learned Assistant City Civil Judge came to the conclusion that the Court had no jurisdiction to frame a scheme, mainly placing reliance upon the Bench de-

*C.C.C.A. No. 64 of 1957 and C.M.P. No. 5739 of 1957. 18th March, 1960. (28th Phalguna, 1881, Saka).

cision of this Court in *Pichu Ayyangar* v. *Ramanuja Jeer Swamigal*[1]. In that decision, the question whether the civil Courts have jurisdiction to frame a scheme after the passing of the Madras Hindu Religious Endowments Act, 1927, was dealt with and answered in the negative. The following passages in the judgment of Leach, C.J., are of significance (at page 885) :

" The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary, the applicants can carry the matter no further ; so much is conceded by the learned advocate for the appellant ".

Again at page 886, the learned Chief Justice observes :

" I agree with Venkataramana Rao, J., that section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are : (1) An order settling a scheme ; (2) an order modifying a scheme, and (3) an order cancelling a scheme. I consider that the words ' institute a suit in the Court to modify, or set aside such order' are intended only to refer to an order settling a scheme or modifying or cancelling one ".

It is now argued before me, as was sought to be argued in the lower Court also, that the situation is quite different under Madras Act XIX of 1951, because a variety of orders is contemplated under section 57 and the subsequent sections, and because specific rights of appeal to the Commissioner are given under section 61 (1), and specific rights to prefer suits against an order passed by the Commissioner under section 62 (1). It is not in dispute that under section 62 (2) of the Act, an appeal to this Court is provided from the decree of the civil Court in the suit instituted under section 62 (1) of the Act.

But even so, the question is not whether a suit may not be technically competent against the order of the Commissioner declining to interfere with the order of the Deputy Commissioner, which itself dropped the proceedings for the settlement of a scheme for this religious trust. The question is whether the Court has now any power to declare that the officer concerned under the statute (Deputy Commissioner) ought to have been satisfied that a scheme should be framed, and whether the Court has any power either to direct him to frame a scheme, or to frame a scheme, itself. This depends upon an analysis of the language of section 58 (1) of Madras Act XIX of 1951, and of the principles upon which the earlier Bench decision held that the Court had no power to frame any such scheme. I think that it can be easily shown that the same principles held the field, under the 1951 Act also, and that the language of section 58 (1) totally precludes the argument that the Court has any power to direct the Deputy Commissioner to be satisfied that a scheme should be framed, or to direct him to proceed to frame a scheme, though he might not have been originally satisfied. Equally, while the power to institute a suit against the order of the Commissioner may not be in dispute, it seems to me very clear that the Court has no power to frame a scheme where this element of subjective satisfaction of the Deputy Commissioner does not exist.

Section 58 (1) of Act XIX of 1951 runs as follows :—

" (1) When the Deputy Commissioner has reason to believe that in the interests of the proper administration of a religious institution, a scheme should be settled for the institution or when not less than five persons having interest make an application in writing, stating that in the interests of the proper administration of religious institution a scheme should be settled for it, the Deputy Commissioner shall consult in the prescribed manner the trustee and the persons having interest and the Area Committee, if any, having jurisdiction over the institution ; and if, after such consultation, he is satisfied that it is necessary or desirable to do so, he shall, by order, frame a scheme of administration for the institution ".

A perusal of this sub-section therefore shows that the Deputy Commissioner has to be satisfied that it is " necessary or desirable " to frame a scheme of administration for the institution, and his consequential order may certainly be taken up in appeal to the Commissioner. Again, under section 58 (6) of the Act, the Deputy Commissioner has even power and jurisdiction to modify or cancel any scheme settled under sub-section (1). It will be noted that the Deputy Commissioner may take cognizance of the matter in one of two ways. He may act *suo motu*, or he may act

1. (1940) 1 M.L.J. 882.

upon an application preferred by not less than five persons having interest in the endowment. In the present case, it is an admitted fact that the Deputy Commissioner proceeded *suo motu*. It is equally undeniable that he was not satisfied that it was necessary or desirable to frame a scheme. The result was that he dropped the proceedings.

I find it quite impossible to conceive how the Court can be clothed with a power to compel an administrative authority to be subjectively satisfied as to a certain matter, when that satisfaction has been made the essential condition under the law for the authority to proceed further. The remarks of Leach, C.J., in the earlier Bench decision are also precisely in point here, to the effect that the Hindu Religious Endowment Board cannot be compelled to hold an enquiry, where it considers that no enquiry is necessary. The statute provides a remedy by way of a suit where this subjective satisfaction exists, and the authorities proceed further to frame a scheme, or to alter, modify or cancel it. But the failure of the authority to be satisfied is not a justiciable matter, and I think that this is abundantly clear from the language of section 58 (1) itself. Though Chapter V is now differently worded in other respects, and a variety of orders is contemplated under section 57 which may be justiciable, this position remains essentially the same.

I therefore come to the conclusion that the learned Assistant City Civil Judge was correct in his view that the Court had no power to frame a scheme in the suit, and the dismissal of the suit has hence to be upheld. With regard to any further remedies left to the appellants, I may observe in this context that it is open to the appellants even now to prefer a petition to the Deputy Commissioner afresh, signed by five of the interested persons, when the Deputy Commissioner may consider the situation in the light of this altered fact. Alternatively, though I am not expressing any conclusive opinion in this regard, it may possibly be open to the appellants to institute a suit outside the ambit of the Act, for the framing of a scheme for this private religious trust: it has been held by at least one authority of this Court that Courts can competently frame schemes even in respect of private religious trusts; Vide *Ramaswami Mudaliar* v. *Aiyaswami Chettiar and others*[1], an unreported decision, to which I was a party. Therefore, the appeal is dismissed. The parties will bear their own costs here.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA IYER.

Firm of M. Chakravarthi Iyengar and others .. *Appellants**

v.

The Collector of Madras .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 87 (2)—Proceedings before Collector or Land Acquisition Officer under sections 9 and 11 of the Land Acquisition Act for determining compensation commencing earlier to the new Court-fees Act—Reference to Court under section 18 of the Land Acquisition Act subsequent to the new Court-fees Act—Court-fees on appeals—If governed by the Old or the New Court-fees Act.

The new Madras Court-fees and Suits Valuation Act, 1955, provides for payment of Court-fees not only in regard to suits but also in regard to matters before the other Tribunals or Officers who may be either Revenue or Administrative Officers. Hence the 'proceeding' referred to in section 87 (2) of the Act should comprehend all matters other than suits. The Collector or Land Acquisition Officer acting under section 11 of the Land Acquisition Act is deciding the rights of parties and such proceedings will also fall under section 87 (2) of the Act. The word 'Proceedings' in the section should be held to be used as meaning a proceeding in the nature of a suit.

Ramanathan Chettiar, In re, (1942) 1 M.L.J. 111, followed.

A reference under section 18 of the Land Acquisition Act is only a continuation or at any rate arises out of, the initial proceedings under section 11 of the Act. Hence appeals filed in High Court which arise out of the proceedings originally started under sections 9 and 11 of the Land Acquisition

1. Appeal No. 552 of 1956.

* Appeals Nos. 178 and 229 of 1959. 29th January, 1960. (9th Magha, 1881, Saka).

Act before the coming into force of the new Court-fees Act of 1955 would be governed by the old Court-fees Act by virtue of section 87 (2) of the new Act.

Appeal against the Orders of the Principal Judge, City Civil Court, Madras, dated 20th December, 1957 and made in Land Cases Nos. 59 and 37 of 1956.

C. Vasudevan and *T. V. Srinivasan*, for Appellant in Appeal No. 178 of 1958.

T. S. Nagaswami Ayyar and *V. Nataraj*, for Appellant in Appeal No. 229 of 1958.

Ramaswami, for the Government Pleader (*K. Veeraswami*), for Respondent in both.

The Court made the following

ORDER.—The question referred for decision in the two appeals is whether the Court-fee paid on them is correct.

The Court-fee that was paid on the appeals was in accordance with the provisions of the Court-fees Act of 1870 which for the sake of brevity I shall hereafter refer to as the Old Court-fees Act. It is contended on behalf of the State that the Court-fee has got to be calculated on the basis of the Court-fees Act (XIV of 1955) which came into force on 19th May, 1955. I shall refer to that Act as the New Court-fees Act. The appeals are filed under section 54 of the Land Acquisition Act claiming a higher compensation for certain lands acquired in Tondiarpet under the Town Planning Act. In respect of the lands so acquired the Land Acquisition Officer published a notification on 14th May, 1955, under section 9. Claims were filed by the appellants on 7th June, 1955, stating that they were entitled to a particular amount of compensation. The Land Acquisition Officer passed the award on 14th June, 1955. The claimants were however dissatisfied with the award and at their instance a reference was made under the provisions of section 18 of the Act on 21st July, 1955. The principal City Civil Judge who heard the reference increased the compensation payable to the appellants. The latter, however, were dissatisfied with what they got and they have filed the above appeals claiming that they are entitled to higher amount of compensation. The claims in the appeals are respectively Rs. 62,189 and Rs. 34,929-8-0. As I stated already the appellants have paid Court-fee under Schedule I, Article 1 of the Old Court-fees Act. They stated that they are entitled to do so by reason of the provisions of section 87 (2) of the New Court-fees Act. That states,

> "All suits and proceedings instituted before the commencement of this Act and all proceedings by way of appeal, revision or otherwise arising therefrom whether instituted before or after such commencement shall, notwithstanding the repeal of the Court-fees Act, 1870 (Central Act VII of 1870) and the Suits Valuation Act, 1887 (Central Act VII of 1887) be governed by the provisions of the said Acts and the rules made thereunder".

Mr. Ramaswami, appearing for the Government Pleader contended that section 87 (2) of the New Act will not apply as there was no proceedings in existence prior to 21st July, 1955, when a reference under section 18 was made to the lower Court. According to the learned counsel the ascertainment of compensation by the Collector or the Land Acquisition Officer under sections 9 and 11 are administrative in character and not being judicial could not be said to be proceedings within the meaning of the section as the Officer concerned could not be said to be acting as a Court. In support of that contention the learned counsel referred to the decisions in *Ezra* v. *Secretary of State for India*[1], *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam*[2], and *Annamalai Chettiar and others* v. *State of Madras and others*[3].

In the present case the reference to the lower Court was made only subsequent to the coming into force of the New Act. It is therefore to be ascertained whether the proceedings could be deemed to be pending before the coming into force of the New Court-fees Act in relation to the award.

The term 'proceedings' hss been defined in the Shorter Oxford Dictionary as 'doings, a legal action or process, any act done by the authority of a Court of law'.

1. (1905) L.R. 32 I.A. 93 : I.L.R. 32 Cal. 605. (F.B.).
2. (1923) 46 M.L.J. 209: I.L.R. 47 Mad. 357.
3. O. S. A. No. 27 of 1954.

In re *Ramanathan Chettiar*[1] was a case where a question arose as to the proper Court-fee payable on the memorandum of a Civil Revision Petition against an order directing a decree-holder to refund a sum of money received by him as ratable distribution. Venkataramana Rao, J., had to consider the meaning of the term 'proceeding' in Schedule II, Article 1 (*b*) (i) of the Old Court-fees Act. The learned Judge held that the word 'proceeding' in its narrow sense could be a step in any action or in an independent proceeding analogous to an action by which a litigation was initiated. In its wider sense if used in juxtaposition with suit, it would include any proceeding in the nature of a suit. The learned Judge further observed that the word 'proceedings' used by itself had been interpreted to mean all judicial proceedings. But having regard to the object of the Court-fees Act the term should be held to be used as meaning a proceeding in the nature of a suit.

Mr. Ramaswami, learned counsel, appearing for the Government, contends that it is an essential element in the term 'proceedings' that it should relate only to the matters before a judicial tribunal and as the Land Acquisition Officer acting under Chapter II of the Land Acquisition Act cannot be said to be acting judicially the proceedings under sections 9 and 11 of the Act could not be held to be proceedings within the meaning of the term as employed in the New Cour-fees Act. Learned counsel further contended that the proceedings under section 11 of the Land Acquisition Act canot be held to be in the nature of a suit as it was purely of an administrative character.

It is an accepted rule of interpretation where a statute does not itself provide an interpretation for a particular term or phrase in order to arrive at the true meaning of that word or phrase one should have to understand it in connection with its context, collocation, etc., in accord with the intention of the enactment and that no word or phrase should be understood detached from its context. The New Court-fees Act is a consolidating statute relating to the payment of Court-fee. Though the Preamble of the Act refers only to suits the operative portions deal with the payment of Court-fee not merely in suits, but in other proceedings as well. Section 3 (2) defines the term 'Court' thus :

> "'Court' means any civil, revenue or criminal Court and includes a tribunal or other authority having jurisdiction under any special or local law to decide questions affecting the rights of parties."

Section 4 which levies Court-fee in Courts and Public Offices prescribes that Court-fee should be paid in respect of documents filed not merely in the Courts but also in any Public Office. By way of example I may also refer to Schedule II, Article (*ix*) which speaks of civil, or revenue proceedings thus indicating that the term 'proceedings' is not confined only to judicial matters but might apply to Revenue matters as well. That the Land Acquisition proceedings are within the operation of the statute is made clear by the provision of section 72 (xviii). That provision specifically exempts an application for payment of compensation under any law from the payment of Court-fee. That would indicate that the proceedings under the Land Acquisition Act would come within the scope of the New Court-fees Act but for that exemption. When therefore the New Court-fees Act provides for the payment of Court-fee not merely in regard to suits but also in regard to matters before the other Tribunals or Officers who may be either Revenue or Administrative Officers, it stands to reason that the proceedings referred to in section 87 (2) should comprehend all matters other than suits. It must be pointed out that in the Old Court-fees Act there was no definition of the term 'Court'. Therefore a Tribunal or any other authority invested with the power of deciding the rights of parties would not come within the meaning of the term 'Court'. It cannot be disputed that under section 11 of the Land Acquistion Act, the Collector is empowered to decide the rights of parties in that he fixes the compensation payable for the property acquired. Section 11 provides for the enquiry and award by the Collector. Section 13 invests the Collector with a power to adjourn the enquiry. Section 14 invests the Collector with power to summon and enforce attendance of witnesses and production of documents. The procedure indicated for the fixing of the amount of compensation under section 11 would show that the proceedings before the Collector are analogous to that of a suit, though actually, it is not a

1. (1942) 1 M.L.J. 111.

suit. Therefore adopting the definition of the term 'proceedings' given in *Ramanathan Chettiar*, In re[1], I am of opinion that 'proceedings' before the Land Acquisiion Officer under section 11 would come within the meaning of section 87 (2) of the New Court-fees Act. Mr. Ramaswami then contended that even assuming that the proceedings before the Land Acquisition Officer were held to be proceedings within the meaning of section 87 (2), the provisions of the Old Court-fees Act will not apply to the instant case as the claims were filed before the Land Acquisition Officer only on 7th June, 1955, that is after the coming into force of the New Court-fees Act. In support of that contention he referred to two decisions of the English Courts, *Sharpington* v. *Fulham Guardians*[2] and *Dale* v. *Hatfield Chase Corporation*[3]. The former case is not of much assistance for a decision of the present question. In the latter case the date on which the right to compensation was determined was on the date of service of notice. The principle of those decisions will not apply to the present case where under sections 9 and 11 the jurisdiction of the officer would exist irrespective of any claim. The Land Acquisition Officer gets jurisdiction to assess the compensation on the issue of a notice under section 9 (2). No doubt the procedure indicated in section 11 requires claims to be filed. But the foundation of the jurisdiction of the Officer is under section 9 by virtue of the notification thereunder and not by virtue of the claim. For even if the claimant does not put forward any claim there is a statutory obligation cast on the officer to assess the compensation. I am, therefore, of the opinion that the proceedings should be properly said to commence in the present case on the date of the notification under section 9, namely, 14th May, 1955, that is before the coming into force of the New Court-fees Act.

It was then contended that the proceedings by way of reference under section 18 are not continuation of proceedings before the Land Acquisition Officer under sections 9 and 11, and that as the proceedings under section 18 commenced only long after the coming into force of the New Court-fees Act the provisions of the Old Act would not apply. In support of that argument the learned counsel contended that the term 'otherwise' used in section 87 (2) should be read *ejusdem generis* with the terms 'appeal' and 'revision' and therefore what section 87 (2) contemplated were proceedings which are analogous to appeal or revision from the original proceeding, and as according to the learned counsel proceedings under section 18 being original in nature and not by way of appeal or revision from the proceedings initiated under section 9, section 87 (2) could be held not to apply under the present case. I am, however, unable to agree. In *Ganga Naicken and another* v. *A. Sundaram Ayyar*[4], Krishnaswamy Nayudu, J., rejected the contention that the word 'otherwise' in section 87 (2) should be read *ejusdem generis* with the words appeal and revision preceding before it. That was a case in which a copy application was filed in respect of an appeal which was filed before coming into operation of the New Act. It cannot be said that a copy application was a proceeding by way of appeal or revision from the substantive appeal. The learned Judge held that the copy application would be governed by the provisions of the Old Court-fees Act in the view that the term 'otherwise' should be understood as meaning arising from. The position in the present case is converse of that in *Ganga Naicken and another* v. *A Sundaram Aiyar*[4]. I have already held that the proceedings under sections 9 and 11 of the Land Acquisition Act before the Land Acquisition Officer, were proceedings within the meaning of section 87 (2) of the Act. The reference proceedings under section 18 is only a continuation or at any rate arises out of those proceedings, though it may not be by way of appeal or revision. That would properly be held as 'otherwise arising therefrom'. It follows that the appeals in this Court which arise out of the proceedings originally started under the notification under section 9 of the Land Acquisition Act prior to the coming into force of the New Court-fees Act would be governed by the provisions of the Old Court-fees Act by reason of section 87 (2). The Court-fee paid is, therefore, correct.

Reference answered.

R.M. — *Reference answered.*

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1. (1942) 1 M.L.J. 111.
2. L.R. (1904) 2 Ch. 449.
3. L.R. (1922) 2 K.B. 282.
4. (1956) 1 M.L.J. 63 at 65.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras by the Agricultural Income-tax Officer, Coonoor .. *Petitioner**

v.

The Glenburn Estates, Coonoor .. *Respondent.*

Madras Plantations Agricultural Income-tax Act (V of 1955), *section* 5 (*e*)—*Payment of bonus to the employee—Expenditure wholly and exclusively laid out for the purpose of land or plantation—Is a permissible deduction—Section* 5 (*f*) *and Rule* 4 (3) *Proviso of the Rules—Pulper used in coffee plantation for the seasonal six months—Depreciation allowance—Whole of the allowance—If a permissible deduction.*

The payment of bonus was not to a 'worker' as defined by Central Act LXIX of 1951 and so would fall outside the scope of section 5 (1) of Madras Act V of 1955. As it was, however, a payment made to an employee and as it satisfied the test of section 5 (*e*) that it was an expenditure wholly and exclusively laid out for the purpose of land or plantation, the payment of this amount is a permissible deduction.

The assessee was a coffee plantation company and the work on the plantation was necessarily seasonal. Apparently work on the pulper could be carried on only for about six months in the year for agricultural purposes. Though the pulper was in the possession of the assessee and available for use all though the year, the pulper was not put to any other use either during the six months or at any other time. The use had necessarily to be restricted to the working season. Under section 5 (*f*) of the Act the assessee is entitled to claim the whole of the depreciation allowance. The Proviso to Rule 4 (3) of the Rules did not justify the claim being reduced proportionately on the basis that though the pulper was available for work all through the year, it was actually used for a portion of year.

The test really should be, in the case of seasonal factories whether the machinery was available for use and for the whole use of agricultural purposes right though the working season.

Petition under section 54 (1) of the Agricultural Income-tax Act praying the High Court to revise the order of the Agricultural Income-tax Appellate Tribunal, Madras, dated 25th October, 1958 and made in A.T.A. No. 41 of 1958.

G. Ramanujam, for the Government Pleader (*K. Veeraswami*) for Petitioner.

A. Sundaram Iyer, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—In this application preferred by the State under section 54 (1) of the Madras Plantations Agricultural Income-tax Act (V of 1955) two questions arise for determination : (1) Was the Tribunal right in allowing the bonus paid to the Assistant Superintendent employed by the assessee as a permissible deduction under section 5 (*e*) of the Act; and (2) Was the Tribunal right in allowing the whole of the depreciation claimed by the assessee with reference to one item of machinery, referred to as the pulper.

The first of these questions we have to answer against the petitioner and in favour of the assessee in view of our decision in T.C. No. 32 of 1957, etc., in which we have just delivered judgment. The payment of bonus was not to a 'worker' as defined by Central Act LXIX of 1951 and so fell outside the scope of section 5 (1). As it was, however, a payment made to an employee, and as it satisfied the test of section 5 (*e*), that it was an expenditure wholly and exclusively laid out for the purpose of land or plantation, the Tribunal was right in allowing this claim of the assessee for deduction.

The amount allowed as depreciation under the second head was Rs. 36. But the question has been raised as one of importance to the Department. Section 5 (*f*) provides for depreciation allowances for buildings, machinery, plant or furniture.

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* T.C. No. 21 of 1959.

27th January, 1960.
(7th Magha, 1881—Saka.)

Section 5 (*f*) itself contemplates rules being made for regulating the grant of the statutory depreciation allowances. The Proviso to Rule 4 (3) of the Rules runs :

> "Provided that where any building, machinery, plant or furniture in respect of which any allowance is due is not wholly used for the purpose of agricultural plantations or is used for the purpose of agricultural plantations only during part of a year, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used."

The facts of this case are not in dispute, and they lie within a narrow compass. The assessee's was a coffee plantation, and the work on the plantation was necessarily seasonal. Apparently, work on the pulper could be carried on only for about six months in the year. During those six months, the pulper was used for agricultural purposes. It was not the case of the Department that either during those six months or at any other time of the year, the pulper was put to any other use. Nor was it in dispute that the pulper was in the possession of the assessee available for use all through the year. But the use had necessarily to be restricted to the working season. Whether under those conditions, the assessee was entitled to the whole of the depreciation allowance or whether only to a proportionate part of the depreciation allowance is the question for determination. The Tribunal held that the Proviso did not justify the claim being reduced proportionately on the basis that, though the pulper was available for work all through the season, it was actually used for a portion of the year.

As the Tribunal pointed out, the Proviso to Rule 4 (3) has apparently been framed on the model of the rules regulating the computation of depreciation allowances under the Income-tax Act. The rule itself has not been elegantly framed and in trying to include within the scope of the Proviso to Rule 4 (3) more than one concept, difficulty of actual application may arise. But if the scope of the rule read with the Form to which it refers is considered, there should be no difficulty in holding that the Tribunal was right in the view it took, that merely because the pulper was worked for a portion of the year, the assessee was not disentitled to the full depreciation allowance, because the pulper had necessarily to be used only during the working season ; and as we have already pointed out, it was a seasonal business which could not be undertaken all through the year.

Rule 4 (3) itself refers to the particulars to be furnished in Part III of the Prescribed Form No. 1. Column 7 of Part III requires the assessee to give the date from which the addition, etc., referred to in Column 6 have been used for the purpose of agricultural plantations. There is no specific Column in Part III to apply, for instance, to seasonal factories to verify during what season or what portion of the year the factory worked. As the Tribunal pointed out, there was a specific provision in the Rules framed under the Income-tax Act for granting depreciation allowances to factories where the working was seasonal. Though it is seasonal, it is deemed to be at work all through the year for regulating grant of depreciation allowance under the Income-tax Act. As we read Rule 4 (3) and the Proviso along with it, we do not understand it was the intention of the Government in the case of factories working only during seasons to restrict the depreciation allowance with reference to the time factor, that is , with reference to the working season in relation to the year. The test really should be, in the case of seasonal factories, whether the machinery was available for use and for the whole use of agricultural purposes right through the working season. If that condition were to be satisfied, we see nothing in the rule or in the Proviso thereto to disentitle the assessee to the whole of the depreciation allowance for that year, though the machinery could have been used only for a portion of year, that is, during the working season. A very literal interpretation of the Provio would lead even to this absurdity. Obviously, the machinery could not be used all day and every day right though the year. There are the normal working hours even during the day. There are holidays in the year. If depreciation allowance is to be calculated only with reference to the actual time the machinery was used, obviously the provision in section 5 (*f*) read with Rule 4 (3) would lead to this, that the provision for depreciation allowance would be robbed of much of its content. That obviously was not intended by Rule 4 (3), nor was that its effect.

The second limb of the Proviso to Rule 4 (3), considered in the light of Part III of Form No. 1 would appear to us to provide for a position, where machinery is acquired in the course of a year. There might also be cases where machinery is sold in the course of the year. Now, with reference to a seasonal factory, machinery might have been acquired after the working season was over or machinery might have been sold before the working season commenced. In either case, though the machinery might have been with the assessee during a portion of the accounting year, the machinery might not have been available for use at all in the year, in the sense it was not available during the working season which alone was really material. The second limb of the Proviso to Rule 4 (3) would appear to apply to such cases where the machinery itself was purchased in the course of the year, that is, the machinery was available for use not throughout the year but only during a portion of the year; and in the case of a factory which had only a working season, the position would be more or less the same, that is, the machinery was available only for a portion of the working season. We are not attempting to exhaust the classes of cases to which the second limb of the Proviso to Rule 4 (3) would apply. We refer to these only by way of examples. But, as we understand the Proviso to Rule 4 (3), there is no scope for working out proportionately on the basis of the time factor, where in the case of a seasonal factory the machinery was available for use throughout the working season, in which case the assessee would be entitled to the whole of the depreciation allowance permissible for the year under section 5 (*f*). That test was obviously satisfied in this case and the Tribunal was right in granting the depreciation allowance claimed by the assessee.

On both the points taken, the petitioner State failed. The petition is dismissed with costs. Counsel's fee Rs. 100.

V.S. ——— *Reference answered against the State.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

R. Venkatachalam Chetty .. *Petitioner**

v.

The Board of Revenue, Madras, by the Commissioner of Land Revenue, Commercial Taxes and Prohibition, Chepauk, Madras and another .. *Respondents.*

Madras Cinemas (Regulation) Act (IX of 1955), *section* 5—*Grant of no objection certificate to locate touring cinema—Simultaneous application by different persons—Principle of selection—Necessity to apply—Existence of several factors—Board attaching more weight to one factor—Order of the Board—If liable to be set right under Article* 226 *of the Constitution.*

In a normal case of an application for a " no-objection certificate " no appeal would lie from the grant because the Rules do not contemplate the consideration of rival claims of different persons. But in a case where the applications are made simultaneously or almost simultaneously all of them complying with the requisite formalities there has necessarily to be a selection due either to the requirements of Rule 14 (2) regulating the distance between the two cinemas or because the population of the area does not admit or justify the running of more theatres than one.

In a case of balancing of several factors, if the Board of Revenue attached more weight to the one rather than to the other, it could not be said that the Board had committed any error which could be set right by the exercise of the jurisdiction under Article 226 of the Constitution.

Shanmugam v. *Arumugam*, (1960) 1 M.L.J. 66, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the resolution of the Board of Revenue, Chepauk, Madras, dated 16th June, 1959 and made in its B.T. Rt. No. 2791, by the Commissioner of Land Revenue, Commercial Taxes and Prohibition and quash the same.

K. V. Sankaran and *S. Palaniswami*, for Petitioner.

* W.P. No. 587 of 1959. 11th December, 1959.

The Additional Government Pleader (*M. M. Ismail*), *G R. Jagadisan* and *Srimathi T. N. Ananthanayaki* for 1st and 2nd Respondents.

The Court made the following

ORDER.—The disputes which have given rise to this Writ Petition centre round the grant of a 'No objection Certificate' to run a touring cinema in the village of Olagadam, which is a minor Panchayat in the Coimbatore District. The Petitioner Venkatachalam Chetty made an application to the Collector for the grant of such a certificate in respect of a site which bore S.F. No. 726 in the village. This application was preferred on 1st September, 1958. The Collector complied with the request of the applicant and granted the certificate after making the necessary enquiries and after satisfying himself that the requisite formalities had been complied with. Besides the petitioner one Subramaniam had also made an application for the grant to himself of a "No objection certificate" in respect of S.F. No. 695 in the same village. This application also had been received in the office of the Collector on 1st September, 1958. This application of Subramaniam was pending before the Collector when Venkatachalam's application was granted. As a consequence of the allowance of this last mentioned application Subramaniam's application was dismissed because there was no scope for the grant of licence to two touring cinemas to run within that village and besides two sites chosen by the parties were within the prohibited distance of each other. Subramaniam preferred an appeal to the Board of Revenue from the rejection of his application which was open to him under the Rules. In his memorandum of appeal to the Board, Subramaniam not merely challenged the validity of the refusal of the licence to himself but also naturally attacked the propriety of the grant of the 'No objection Certificate' to Venkatachalam. The Board issued notice to Venkatachalam and after considering the representations made by him allowed the appeal and remanded the two applications to the Collector for fresh disposal of both together in accordance with law. This order of the Board has become final and it is on the basis of this order that further proceedings before the Collector took place. I might also mention that the validity of this order cannot even be impugned even if it were so open. In accordance with this order of remand of the Board of Revenue, the Collector considered both the applications together and by his order dated 4th March, 1959, he granted a 'No objection Certificate' to Venkatachalam and as a necessary consequence the application of Subramaniam was rejected for the reason that the site selected by the latter was within four furlongs of the site selected by Venkatachalam. Subramaniam who was naturally dissatisfied with this order took the matter again in appeal to the Board of Revenue and the Board allowed his appeal by their order dated 16th June, 1959 and it is the validity of this last order that is impugned in this writ petition under Article 226 of the Constitution.

Before adverting to the points raised by the learned counsel for the petitioner it would be convenient to set out the main ground on which the Collector preferred Venkatachalam to Subramaniam for the issue of 'No objection Certificate.' The Superintendent of Police, Coimbatore, the Tahsildar and the Revenue Divisional Officer had expressed their opinion that the sites chosen by both the applicants were unobjectionable from the traffic and other points of view. Both the applications had been received in the Collector's Office on the same day, namely 1st September, 1958. But Venkatachalam was preferred for the reason that he had complied with all the requirements of the Rules at an earlier date. The Collector pointed out that Subramaniam's application when it was filed was defective, that it was returned for rectification of the defects and that it conformed to all the requirements of the Rules only on 17th September, 1958, so that he treated the application of Venkatachalam as having a claim to priority by reason of its being of an earlier date. Another reason adduced by the Collector related to the opinion of the Panchayat which had to be taken into consideration under the last portion of section 5 (1) of the Madras Act XIX of 1955. Rule 35 of the Madras Cinema (Regulation) Rules, 1957, provides, to quote the relevant paragraph,

"35 (2). A copy of the application. . . . . . shall be sent to the local authority which shall forward it within one month from the date of receipt of the application from the applicant to the

licensing authority with its remarks recording its objections, if any, to the site and to the installation of machinery."

There is a Note to this rule which runs thus :—

> " On receipt of the application from the applicant, the licensing authority shall ensure from the local authority and the police that they have received copies of the application and ascertain the dates of their receipt to avoid non-receipt or delay in receipt of the copies by the authorities concerned. If no reply is received within the time prescribed in sub-rules (2) and (3) it shall be presumed by the licensing authority that there is no objection."

The application of Venkatachalam was sent to the concerned panchayat on 1st September, 1958 or thereabout. No reply, was however, received from the panchayat in respect of this application until 3rd November, 1958 when the panchayat passed a resolution stating that it could not recommend the grant of a 'No objection Certificate' to Venkatachalam. The reason for this refusal was stated to be that it had already recommended the grant of "No objection Certificate" to Subramaniam. Subramaniam himself had submitted his application to the Panchayat even before he filed it before the Collector and on 13th September, 1958, the President of the Panchayat recommended the grant of 'No objection Certificate' on the strength of a resolution passed by the panchayat on 20th August, 1958. The Collector held that the objection of the panchayat to the grant of 'No objection Certificate' to Venkatachalam should be disregarded because it had not been received within the period of one month as provided for in Rule 35 and as regards the grant of 'No objection Certificate' to Subramaniam he held that as the resolution of the panchayat was passed even before the application was filed before him it was ineffective.

These reasons for preferring Venkatachalam were considered by the Board of Revenue and they held that they could not accept the Collector's view about the value to be attached to the resolution of the panchayat. The Board pointed out

> " The Collector seems to have been carried away by the fact that the appellant had approached the Panchayat Board, earlier to the date of his application. The Board does not see how the Collector can have any valid objection to this procedure and there is nothing in the Madras Cinemas (Regulation) Rules, 1957, which can invalidate the resolution of the Panchayat Board ".

One other matter that might be mentioned is that though on the terms of Rule 35 the Collector could have proceeded to consider the application without reference to the panchayat if its view about the application were not received within one month. I do not see how the Collector can fail to take note of or disregard a resolution of the panchayat which had been communicated to him before the application was actually considered and ordered.

It appears to me that there is really little that could be said against the legality of the order of the Board because they were admittedly the appellate authority who could consider the decision of the Collector on the merits.

The point, however, that was urged by the learned counsel was based upon a decision of this Court in W.A. No. 98 of 1958[1] where the learned Chief Justice has discussed the procedure to be followed in the grant of a 'No objection Certificate'. The passage that is now relied on by the learned counsel for the petitioner was

> "the appellant made an application for a "No objection Certificate" and so far as we are able to see, there is nothing in the provisions of the Act or in the Rules which makes it incumbent on the Collector to take into consideration any representation of a competing applicant. . . . . . the appellant aggrieved by that order appealed to the Board of Revenue as he was entitled to appeal. The only question which the Board was called upon to decide in the appeal was the question of the suitability of the site, whether the reason assigned by the Collector was a valid reason for rejecting the appellant's application. *Prima facie* there could be no other party interested directly in the result of the appeal. It is true that the application of the respondent was liable to be rejected in case the appeal was allowed and the appellant was granted a " No objection Certificate ".....
>
> " There still remains the larger question whether there is anything in the Act or the Rules which compels the Collector or the Board to make a slection, and if there is, what are the circumstances in which the principle of selection has to be applied, what are its limits ? Is there any fixed point of time with reference to which this principle of selection has to be applied ?"

1. Since reported *Shanmugham* v. *Arumugham* (1960) 1 M.L.J. 66.

After pointing out the distinction between the principle of selection that is applied to determine the preference among the several applicants for the grant of a stage carriage permit uner the Motor Vehicles Act the learned Judge went on to state :

> " There are several difficulties in invoking the principle of selction in respect of applications for the issue of " No objection Certificate " under the Madras Cinemas Regulation Act."

Their Lordships finally held that the principle of selection could not normally be applied and that in an appeal against an order refusing the grant of a ' No objection Certificate ' the only order that could be passed by the Board would be, if they had allowed the appeal, to direct the grant of the certificate to the appellant and cannot extend to directing the setting aside the grant of the certificate already made to a rival applicant. Based on this reasoning, learned counsel for the petitioner urged that in the present case the Board had exceeded their jurisdiction in directing the setting aside of the grant of ' No objection Certificate ' to the petitioner.

I have examined this decision of the Bench which is binding on me with great care, but I must say that it does not lead to the result for which the learned counsel contends. In a normal case of an application for the grant of ' No objection Certificate ' no appeal would lie from the grant, because the Rules do not contemplate the consideration of rival claims of different applicants. In a case however, where applications are made simultaneously or almost simultaneously, all of them complying with the requisite formalities there has necessarily to be a selection due either to the requirements of Rule 14 (2) regulating the distance between the two cinemas or because the population of the area does not admit or justify the running of more theatres than one. In such a case there has necessarily to be a selection. It was precisely this contingency that was envisaged by the learned Chief Justice when he observed:—

> " There may be an extraordinary contingency of the applications for the issue of " No objection Certificate " made by two persons on the same date for sites which lie within the prohibited distance from each other. In such a case it may be that the Collector will make a selection or he may send for both the applicants and ask them to modify their applications in respect of the situation of the sites ".

I consider that the facts of the present case fall within the principle here enunciated. There were in the present case two applications, both made on the same date (1st September, 1958), though Subramaniam (2nd respondent) complied with all the formalities required by Rule 100 only on 17th September, 1958. If that was a circumstance that could weigh against the 2nd respondent and in favour of the petitioner there was a countervailing circumstance, namely, that the 2nd respondent's application was not supported by the panchayat of the village whereas that of the petitioner was recommended by it. It was, therfore, a case of balancing of several factors and if the Board attached more weight to the one rather than to the other, it could not be said that they had committed any error which could be set right by the exercise of the jurisdiction of this Court under Article 226 of the Constitution. Besides it would also be seen that under section 5 (1) of the Act there is a statutory obligation cast upon the licensing authority to take into consideration the views of the local authority whereas the rule that first come first served would only have a limited and other than statutory force. Learned counsel for the respondent also submitted, and in my opinion, that submission is well founded, that if the two applications were in order on the date when they were considered, mere priority in the filing of the application would not be a very material circumstance making a preference among the applicants.

What I have said earlier ought to suffice to say that in my opinion there are no grounds for interfering with the order of the Board of Revenue. The petition fails and is dismissed. No order as to costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Special Tahsildar, Land Acquisition, Lignite Project, Neyveli, at Cuddalore and others .. *Appellants**

v.

Susai Padayachi and others .. *Respondents.*

Land Acquisition Act (I of 1894), sections 18 and 54—Order on reference under section 18—When appealable under section 54.

Section 54 of the Land Acquisition Act provides that an appeal can be filed in any proceedings under the Act from an award or any part of such award. There is no definition in the Act of the term 'award'. But when once there is a proper reference before the Court under section 18 of the Act all orders passed in that reference would be awards and an appeal would lie. Where on a reference under section 18 the Court gives a decision which has the effect of nullifying the award of the Land Acquisition Officer and a remittal of the proceedings for purposes of fixing the proper amount of compensation, that would be an award against which an appeal would lie to the High Court under section 54 of the Act.

Muthuveerappa Pillai v. *Revenue Divisional Officer, Melur,* (1930) 59 M.L.J. 682 and *Ramachandra Rao* v. *Ramachandra Rao,* (1923) 43 M.L.J. 78 : I.L.R. 45 Mad. 320 : L.R. 49 I.A. 129 (P.C.) referred.

Land Acquisition Officer, Tellicherry v. *The Valia Raja of Chirakkal Kovilagam,* (1944) 2 M.L.J. 130, doubted.

Appeals sought to be preferred to the High Court, against the decrees of the Court of the Subordinate Judge of Cuddalore in O.P.s Nos. 405 of 1958, 261 of 1957, 404, 370, 6, 109, 326, 718, 319, 355, 354, 377, 578, 371, 401, 170, 585, 402, 403, 372, 373, 108, 110, 375, 374, 505, 107, 324, 323, 321, 325, 5, 320, 327, 322, 62, 563 of 1958, 262 of 1957 and 356 of 1958.

Office Note.—The above batch of S. R's. presented as appeals under section 54 of the Land Acquisition Act arise out of orders passed on references made to the Subordinate Judge's Court, Cuddalore, under section 18 of the Land Acquisition Act for enhanced compensation. The Subordinate Judge, while deciding the question raised has remitted back the reference to the Collector with a direction to pronounce a revised award after adopting the mode of valuation of the land in accordance with the Land Acquisition Act and not with reference to the amendment made in that Act by Madras Act XI of 1953. The question for consideration is whether against such an order of the Subordinate Judge, an appeal is competent to the High Court under section 54 of the Land Acquisition Act or whether the remedy is by way of revision to the High Court under section 115, Civil Procedure Code. Section 54 of the Land Acquisition Act can be invoked only when there is an award passed on a reference under section 18 of the Act. In the present case the order that is now sought to be appealed against does not appear to come within the meaning of the term 'award' under the Land Acquisition Act as the Land Acquisition Judge has neither confirmed nor varied nor modified the order of the Land Acquisition Officer fixing the amount of compensation. Inasmuch as there is no finality arrived at on the question referred to for determination by the Land Acquisition Judge, the order of the Judge does not appear to come under the purview of the term 'Award'. No appeal in such a case appears to be competent under section 54 of the Land Acquisition Act. In a decision of the Madras High Court reported in *Revenue Divisional Officer, Tellicherry* v. *Valia Raja,*[1] the Hon'ble Mr. Justice Wadsworth (as he then was) has taken the view that the jurisdiction of the Court under section 18 of the Act is a special jurisdiction for the Court to enquire into the objection to the Collector's award and to make an award itself after hearing the relevant evidence. It is also expressed therein that the Act does not empower the Court to remand the matter to the Collector for fresh enquiry and for a further award. If, however, the Court remanded the case, his Lordship was of the opinion that the High Court can set aside the order in revision. The appeal and the Memorandum of Cross-Objections in the case reported in *Revenue Divisional Officer, Tellicherry* v. *Valia Raja,*[1] were consequently dismissed. The facts of the present case are on all fours with those of the case cited above and a Revision alone appears to be the proper remedy in such a case.

To the objection raised by the Office regarding the competency of the appeals in view of the decision of Mr. Justice Wadsworth in the case cited above, the Advocate for appellants contends that an appeal alone is competent and relies on a decision reported in *Muthuveerappa Pillai* v. *Revenue Divisional Officer, Melur.*[2] It is submitted that the facts of that decision are distinguishable from the facts of the present case as the appeal in the case cited related to the question of enhanced compensation over and above that granted by the Land Acquisition Judge. It was held in that decision that an appeal lay under section 54 of the Land Acquisition Act. The position is different in the present case as this appeal is against the order remitting the reference back for passing a revised award.

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* S.R. Nos. 26775, 26777, etc. of 1959.

29th January, 1960.
(9th day of Magha, 1881-Saka).

1. (1944) 2 M.L.J. 130 : A.I.R. 1944 Mad. 539.
2. (1930) 59 M.L.J. 682 : A.I.R. 1931 Mad. 26.

As the matter is not free from doubt this note is submitted for orders on the question whether a Civil Revision Petition is not the proper remedy under Section 115, Civil Procedure Code.

The Government Pleader (*K. Veeraswami*) for Appellants in all cases.

The Court made the following

ORDER.—In a reference under section 18 of the Land Acquisition Act in the matter of awards of compensation for the acquisition of certain lands in Velayudanpattu village in the South Arcot district, the learned Subordinate Judge of Cuddalore set aside the award of the Land Acquisition Officer and remitted the matter for passing a revised award. This the learned Subordinate Judge did as he found that the basis of the valuation adopted by the Officer was under Act XI of 1953 which has since been declared to be unconstitutional. The State has preferred the appeals against the order of remittal on the ground that the lower Court had no jurisiction to set aside the awards and remit the same for passing revised awards. The Office of the Registrar has taken objection to the maintainability of the appeals and has referred the matter to Court.

Section 54 of the Land Acquisition Act under which the appeals are sought to be filed allows an appeal in any proceedings under the Act to the High Court from the award or from any part of the award. There is no definition in the Act of the term 'award' but in *Ramachandra Rao* v. *Ramachandra Rao*[1], the Privy Council observed at page 329 that

"Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award. By section 54 an appeal from that award or of any part of the award is given to the High Court. . . . . ."

In *R. D. O. and Land Acquisition Officer, Tellicherry* v. *The Valia Raja of Chirakkal Kovilagam and another*[2], a similar question arose. Wadsworth, J., held that the Land Acquisition Act did not empower the Court to remand the case to the Collector for fresh enquiry and for a further award and as there was no right of appeal against the order of a Judge declining to make the award, the proper proceeding to set aside the order was to apply to this Court under section 115 of the Civil Procedure Code by way of revision.

It does not, however, appear that the decision of a Bench of this Court in *Muthuveerappa Pillai* v. *Revenue Divisional Officer, Melur*[3], was brought to the notice of the learned Judge. In that case there was a reference under section 18 of the Land Acquisition Act to the lower Court. Pending the disposal of the reference the Government cancelled the notification. In view of the cancellation of the notification the lower Court closed the proceedings relating to the reference but made certain orders in regard to the payment of costs. A question arose whether there could be an appeal agaist the order of the lower Court. The learned Judges held that once there was a proper reference before the Court under section 18 all orders passed in that reference would be awards and an appeal would lie. In the present case we find that in this case there is a decision by the Court under section 18 which has the effect of nullifying the award of the Land Acquisition Officer and a remittal of the proceedings for the purpose of fixing the proper amount of compensation. That would be an award within the meaning of the term as adopted by the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[1], namely an order that is necessary for the fixing of the amount of compensation. I am therefore of the opinion that the order in the present case would be an award within the meaning of section 54 of the Land Acquistion Act and an appeal can be entertained under that provision. Reference answered.

R.M. ——— *Reference answered.*

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1. (1923) 43 M.L.J. 78 : L.R. 49 I.A. 129 : I.L.R. 45 Mad. 320 (P.C.).
2. (1944) 2 M.L.J. 130.
3. (1930) 59 M.L.J. 682 : A.I.R. 1931 Mad. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Chelladorai *alias* Tiruvarasu Pandian (Minor) by maternal uncle and next friend G. Ramiah Pillai and another .. *Appellants.*

v.

Varagunarama Pandiya Chinnathambiar (died) and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 45 (4)—*Impartible estate notified and taken over by Government—Illegitimate son of the holder—Right to a share in compensation on the basis of right to maintenance—Maintenance not a right under the general law but may be under custom—Custom—Where proof not necessary—Essential of a custom.*

An illegitimate son of a holder of an impartible estate would have no right to be maintained out of the impartible estate under the general law relating to impartible estates.

Section 9 of the Madras Impartible Estates Act (II of 1904), in setting out the persons entitled to be maintained out of an impartible estate mentions the son, grandson and great grandson among others. An illegitimate son would not come within the category of relations set out in the section.

But the illegitimate son's right to maintenance could exist if there is a universal, local, or family custom sanctioning it.

Though the ordinary rule is that the party who sets up the custom should prove it, yet in cases where the custom is so well recognized, and repeatedly brought to the notice of the Courts, the Courts might take notice of them as engrafted on the general Hindu Law. On this basis the illegitimate sons in the instant case were held entitled to be maintained out of the impartible estate by custom without the necessity of independent proof of such custom, and thus entitled to a share of the compensation amount deposited on the impartible estate being notified and taken over by the Government.

Appeal against the order of the Estates Abolition Tribunal, Madurai, in O.P No. 170 of 1951.

R. Sundaralingam and *S. W. Kanakaraj,* for Appellants.

R. Vaidyanathan and *T. R. Mani,* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals under section 51 of Act XXVI of 1948 are directed against the orders of the Estates Abolition Tribunal, Madurai, in O.P. Nos. 167 1951 and 170 of 1951, rejecting the claim of the respective appellants for a share in the compensation amount. Sivagiri in the Tirunelveli District was an ancient impartible estate ; and it was also included in the Schedule to the Madras Impartible Estates Act (II of 1904). On the passing of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), which hereafter shall be referred to as the Act, the Sivagiri Estate was taken over by the Government as and from 3rd January, 1951, the date of the notification. An advance compensation of Rs. 2,40,000 was deposited by the Government with the Chairman of the Estates Abolition Tribunal.

Senthattikalai Pandian Chinnathambiar, the previous Zamindar of Sivagiri Estate, died in 1934, leaving his surviving 7 sons, born of lawful wedlock and one Chinnadurai *alias* Ramachandran, the appellant in S.T.A. No. 138 of 1954, who was born of his continuously kept concubine. On the death of the Zamindar, the eldest of the legitimate sons, Varaguna Pandian, suceeded to the Zamindari. The management of the estate was, however, handed over by him in 1941 to the Court of Wards under section 18 of the Madras Court of Wards Act. Varaguna Pandian married two wives, and had a concubine as well. He had four sons through his two wives, and two illegitimate sons, Chelladurai and Swamidurai through his concubine. They are the appellants in S.T.A. No. 132 of 1954. It must be noticed that, on the date of the notification under Act XXVI of 1948, Varaguna Pandian

* S.T.A. Nos. 132 and 138 of 1954. 25th January, 1960. (5th Magha, 1881-Saka).

was the landholder, though the management of the Sivagiri Estate was in the hands of the Court of Wards.

In O.P. No. 170 of 1951, the six brothers of the Zamindar, Varaguna Pandian, joining with their illegitimate half-brother, Chinnadurai (*viz.*, the legitimate and illegitimate sons of the previous zamindar) claimed that they were entitled to a share in the compensation amount under section 45 (6) of the Act, or alternatively, to an aliquot share of the 1/5th of the compensation amount under section 45 (4) and (5). During the pendency of the petition, an arrangement was entered into between the Court of Wards and the six brothers of the Zamindar. The petition, therefore, proceeded before the Tribunal only with regard to the claim of the illegitimate son of the previous Zamindar. His claim was contested by the Court of Wards. The Court of Wards denied that he was illegitimate son of the previous Zamindar ; it was also contended that, even if he were the illegitimate son of the previous Zamindar, he would not be entitled to any maintenance out of the impartible estate of Sivagiri, and consequently to any portion of the compensation amount.

The Tribunal found that Chinnadurai was the *dasi putra* or illegitimate son of the previous Zamindar, born to him by his continuously kept concubine. On the other question, the Tribunal held that, as there was no proof of any special custom obtaining in the family, whereby the illegitimate son of the Zamindar was entitled to be paid maintenance out of the income from the impartible estate, Chinnadurai's claim had to fail. In that view, the Tribunal rejected the application of the illegitimate half-brother of the Zamindar to a share in the amount, set apart for payment to the maintenance holders under section 45. Chinnadurai has filed S.T.A. No 138 of 1954 against the order of the Tribunal.

O.P. No. 167 of 1951 was filed by Chelladurai and Swami Durai, claiming as the illegitimate sons of Varaguna Pandian, who was the Zamindar at the time of taking over the estate by the Government. They put forth claims similar to Chinnadurai. Their status as illegitimate sons of the Zamindar was, however, not denied. But their right to participate in the compensation amount was denied. The Tribunal held that, under the law, the illegitimate sons of the Zamindar would not be entitled to maintenance out of the income from the impartible estate, in the absence of custom, and that, as there was no proof of any such custom, the petitioners would not be entitled to the reliefs prayed for. In that view, the claim of Chelladurai and Swami Durai was rejected. S.T.A. No. 132 of 1954 is filed by the aggrieved claimants against the order of the Tribunal.

It may be noticed that, in neither of the two cases, was any evidence let in about the existence of any custom in the family of the Zamindar of Sivagiri, which would entitle the illegitimate son of a past or present Zamindar to be maintained out of the impartible estate. Such a right, however, has been put before us on the basis, that the custom was too well established to require proof of it in this particular case, and that judicial notice should be taken of the existence of such a custom.

Independent of such a custom, it was also contended that an illegitimate son of the proprietor of an impartible estate would be entitled to be maintained out of it. Reliance for this contention was placed upon the dictum in certain decided cases, that an illegitimate son of a sudra has the status of a son who would be a member of his putative father's family ; it was argued that such an illegitimate son would be entitled to be maintained out of income from the impartible estate, just as a son would be, and that on the abolition of the zamindari, the illegitimate son would be entitled to a share along with other members of the family in the one-fifth share of the compensation amount under section 45 (4) of the Act. The validity of the contention depends on the assumption, that independent of a custom every member of a Zamindar's family would be entitled to be maintained from the impartible estate. That we shall show presently is not the law.

But before considering that aspect of the matter it is necessary to dispose of the contention regarding the claim to a share of the compensation amount under section 45 (6).

Under section 3 (*b*) of the Act, the entire estate shall stand transferred to the Government and vest in them, free of all encumbrances. Under section 66, the Madras Impartible Estates Act, 1904, would cease to apply to the estate, if it had been governed by that enactment immediately before that date. Under section 3 (*e*) of the Act, the principal or any other landholder and any other person whose rights stand transferred shall be entitled to such rights and privileges as are recognised or conferred under the Act. The Act provides for payment of compensation for an estate taken over. Section 45 refers to apportionment of compensation in the case of certain impartible estates. It runs as follows :—

"(1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply.

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as single group :—

(*a*) the principal landholder and his legitimate sons, grandsons and great-grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great-grandsons adopted before such date (who are hereinafter called 'sharers') ; and

(*b*) other persons, who, immediately before the notified date, were entitled to maintenance out of the estate and its income either under section 9 or 12 of the Madras Impartible Estates Act, 1904, or under any decree or order of a Court, award, or other instrument in writing or contract or family arrangement which is binding on the principal landholder (who are hereinafter called 'maintenance holders') :

Provided that no such maintenance-holder shall be entitled to any portion of the aggregate compensation aforesaid, if before the notified date, his claim for maintenance, or the claim of his branch of the family for maintenance, has been settled or discharged in full.

(3) The Tribunal shall next determine which creditors, if any, are lawfully entitled to have their debts paid from and out of the assets of the impartible estate and the amount to which each of them is so entitled and only the remainder of the aggregate compensation shall be divisible among the sharers and maintenance-holders as hereinafter provided.

(4) The portion of the aggregate compensation aforesaid payable to the maintenance-holders shall be determined by the Tribunal and notwithstanding any agreement already made in respect of maintenance whether by a decree or order of a Court, award or other instrument in writing or contract or family arrangement such portion shall not exceed one-fifth of the remainder referred to in sub-section (3) except in the case referred to in the second proviso to section 47, sub-section (2).

(5) (*a*) The Tribunal shall, in determining the amount of the compensation payable to the maintenance-holders and apportioning the same among them, have regard, as far as possible, to the following considerations, namely :—

(i) the compensation payable in respect of the estate ;

(ii) the number of persons to be maintained out of the estate ;

(iii) the nearness of relationship of the person claiming to be maintained ;

(iv) the other sources of income of the claimant ; and

(v) the circumstances of the family of the claimant.

(*b*) For the purpose of securing (i) that the amount of compensation payable to the maintenance-holders does not exceed the limit specified in sub-section (4) and

(ii) that the same is apportioned among them on an equitable basis, the Tribunal shall have power, whereever necessary, to re-open any arrangement already made in respect of maintenance, whether by a decree or order of a Court, award, or other instrument in writing, or contract or family arrangement.

(6) The balance of the aggregate compensation shall be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date ".

As we pointed out before, on the taking over of an estate under the Act the only rights created in favour of the erstwhile landholder including the members of his family would be those granted under the Act, *viz.*, compensation money or pattas in certain cases. The Act makes provision for the distribution of the compensation amount. Section 45 contemplates such distribution only amongst the sharers, who have been statutorily defined as the principal landholder and certain of his descendants in the male line ; *vide* section 45 (2). That specifically refers only to legitimate

issue. No other member of the family would therefore get a right to a share in the compensation amount under section 45 (6).

The claim for a share of the compensation amount would depend on the question, whether a coparcenary existed between the holder of the impartible estate and the various claimants in respect of the compensation amount. This question arose for consideration in *Ranga Rao* v. *State of Madras*[1]. It was held in that case that the compensation amount paid by the Government could not be treated as joint family property, and that the custom of impartibility did not attach itself to the compensation, to entitle the brother of a Zamindar to claim a share therein. The reason was that the younger brother of the principal landholder, who had no interest in the impartible estate on the date of notification except rights to get customary maintenance, would not be entitled to any right in the compensation amount, except to such rights therein which are granted to him by the Act in lieu of the right of maintenance he had. The learned counsel for the appellants, although he did not give up the point conceded that this decision is binding on us, which should suffice to negative the right of the appellants to share in the compensation amount under section 45 (6) of the Act. In our opinion the decision in *Ranga Rao* v. *State of Madras*[1] is decisive on the claim to a share of the compensation amount.

The substantial question which is common to both the appeals is, whether an illegitimate son of a landholder of an impartible estate would be entitled to maintenance out of the estate, so as to entitle him to a share in the compensation amount which is set apart under the provisions of section 45 (4) of the Act to the persons entitled to maintenance out of the estate.

In certain cases a right to maintenance may or does exist irrespective of the possession of any property. For example, under the Hindu Law, there is a personal liability to maintain the wife, minor sons, unmarried daughters and aged parents. This obligation does not depend on the person owning any property. Equally personal is the liability recognised under section 488 of the Criminal Procedure Code, which would cover an obligation to maintain an illegitimate child. Such personal obligations very often lapse on the death of the person liable to provide the maintenance. Such rights would not, however, come under section 45 of the Act except to the extent of the maintenance-holder coming in, in regard to unpaid arrears of maintenance as a creditor of the principal landholder.

There is, however, yet another kind of liability. That depends on the existence of property. The basis of such a liability is stated in Mayne on "Hindu Law and Usage", 11th Edition, page 813, thus :—

> "The importance and extent of the right of maintenance necessarily arises from the theory of an undivided family. The head of such a family is bound to maintain its members, their wives and their children, to perform their ceremonies, and to defray the expenses of their marriages ; in other words, those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income".

The principal or theory on which the right is based is that the member had some kind of right in the property as a member of the family, though he was not a coparcener or one entitled to claim a share therein. Therefore, before a person can claim to be entitled to be maintained out of impartible estate, it should be found that he had interest therein. It is now well settled that impartibility is essentially a creature of custom. Ordinarily family property is partible ; but property might not be partible by virtue of the express terms in a Sannad or grant made by the Crown or Government, or it may be such by reason of custom. Under the Hindu Succession Act XXX of 1956 impartibility is recognised only in the case where the terms of a Crown or Government Grant impose such a condition. Impartibility by custom has not been recognised, and succession to such property would hereafter be regulated by the rules which apply to other property.

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1. (1952) 2 M.L.J. 243 : I.L.R. (1953) Mad. 479.

But the rights of the parties in the present case arose before the Hindu Succession Act, 1956, came into operation and will be governed by the general principles of the Hindu Law.

Where impartibility is by virtue of custom, it has been held that the property, though it was an ancestral one, was not held in coparcenery by the various members of the family. The junior members have no right to the property. They have no right to interdict alienations by the holder of the estate or to claim partition. In *Shibaprasad Singh* v. *Prayagkumari Debi*[1], Sir Dinshaw Mulla observed :

" Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility. . . . To this extent the general law of the Mitakshara has been superseded by custom, and impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorshop is not inconsistent with the custom of impartibility. This right, therefore, still remains . . . To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains ".

It was held that the holder of an impartible estate could alienate by gift *inter vivos* or by will unless he was prevented from doing so by the terms of the grant or by custom. This rule, however, would have only a limited application in Madras, where there is a statutory provision regulating the rights over impartible estates which have been included in the Schedule thereto. Section 4 (1) of that enactment specifically provides that the proprietor of an impartible estate would not be capable of alienating or binding by his debts, except to the extent to which the manager of a joint Hindu family could do.

But whether it be under the general law or under the provisions of Madras Act II of 1904, the junior members would have no interest in the impartible estate. Having no interest in the impartible estate they would have no right to maintenance out of that estate on the theory of such liability attaching to family property in favour of its members. An illegitimate son whether of the previous or the present zamindar would therefore have no right to be maintained out of the impartible estate under the general law relating to impartible estates.

But right to maintenance could exist if there is a universal, local or family custom sanctioning it. In *Rama Rao* v. *Rajah of Pithapur*[2], the Privy Council held that, in the absence of special custom, the grandson of the deceased zamindar would not be entitled to maintenance out of impartible estate in the hands of his successor. Lord Dunedin observed at page 785 :

" An impartible zamindari is the creature of custom, and it is of its essence that no coparcenery exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case".

In *Kondama Naicker* v. *Kondama Naicker*[3], there was a claim for maintenance by the illegitimate son of a former zamindar of an impartible estate. The zamindari was in possession of the paternal uncle's son of the former zamindar. The claim of the illegitimate son was put on the ground of his right in the impartible estate

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1. (1939) I.L.R. 59 Cal. 1399 at 1413 : L.R. 59 I.A. 331 : 63 M.L.J. 196 (P.C.).
2. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
3. (1942) M.W.N. 71.

as a member of the joint family. That claim was negatived by a Bench of this Court following the decision of the Privy Council in *Rama Rao* v. *Raja of Pithapur*[1].

The question was elaborately considered again by the Privy Council in *Commissioner of Income-tax, Punjab* v. *Krishna Kishore*[2]. It was held that income from an impartible estate was not the income of the undivided family but that of the holder, notwithstanding the fact that he had sons, and that there was no right to maintenance in the junior members save as such that was impressed by custom. Such custom was held to have been recognised in the case of sons.

Section 9 of the Madras Impartible Estates Act recognises the right of certain junior members to maintenance and make specific provisions as to the persons entitled to maintenance out of an impartible estate and its income where such an estate is joint family property. Section 9 sets out the persons entitled to maintenance. They are the son, grandson and great grandson of the proprietor of the estate or of any previous proprietor as well as their childless widows, the widow of any previous proprietor, and the unmarried daughter of the proprietor or of any previous proprietor as well as of a son or grandson of the proprietor or of any previous proprietor where she has neither father, mother and brother. An illegitimate son would not come within the category of relations set out in section 9. Section 12 states :

> " Nothing contained in this Act shall affect the right to maintenance out of an impartible estate and the income thereof, of any other relations of the proprietor or any previous proprietor under any law or custom for the time being in force."

Therefore, before an illegitimate son can claim to be maintained out of an impartible estate or its income, he should prove a custom by which he would be entitled to such maintenance.

The ordinary rule is that the party who sets up a custom should prove it. But there may be cases in which the custom is so well recognised that Courts might take notice of them as engrafted on the general Hindu Law. In such cases it would not be necessary for the party setting up the custom to prove it in the way in which a custom should be proved. In *Rama Rao* v. *Raja of Pithapur*[1], it was observed that if a custom had been repeatedly brought to the notice of Courts and recognised, the Courts might accept the same as part of law of the land without necessity of independent proof in any particular case.

There was such recognition in regard to the claim to maintenance by the son of a previous proprietor. In *Thangavelu* v. *Court of Wards, Madras*[3], the rule was recognised in the case of an illegitimate son as well. In that case, Patanjali Sastri, J., (as he then was) observed at page 152 :—

> " The sons of a deceased zamindar are entitled to maintenance out of the impartible estate in the hands of his successor without proof of special custom. The illegitimate son of a Sudra has been held to be a member of his putative father's family and to have the status of a son for purposes of maintenance. His right to receive maintenance out of his father's impartible estate was recognised and given effect to as well established by judicial precedents as long ago as 1870. In these circumstances we consider that no proof of special custom is necessary to entitle the appellants to maintenance out of the zamindari in the hands of the respondents 1 and 2 ".

The learned Judge referred to the decisions in *Chouturya Run Murdun Syn* v. *Sahub Purhulad Syn*[4], *Naragunty Lutchmeedayamah* v. *Vengama Naidoo*[5], *Muthuswami Jagavera Yettappa Naicker* v. *Venkateswara Yettaya*[6], and the same case on remand to the High Court in *Coommera Yettappa Naicker* v. *V. Venkatateswara Yettiya*[7]. The decision in *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*[4], related to succession to a *Raj*. There was a claim by an illegitimate son of the previous *Rajah* who belonged to the *Khatri Caste*, one of the regenerate castes in Hindu society. It was held that the illegitimate son would be entitled only to maintenance and not to a

1. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
2. (1941) 2 M.L.J. 972 : L.R. 68 I.A. 155 : I.L.R. (1942) 23 Lah. 1 (P.C.).
3. (1946) 2 M.L.J. 143.
4. (1857) 7 M.I.A. 18 (P.C.).
5. (1861) 9 M.I.A. 66 (P.C.).
6. (1868) 12 M.I.A. 203 (P.C.).
7. 5 Mad. H.C. R. at 405.

share in the property on the ground that the previous Rajah was not a Sudr *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*[1], related to a disputed succession in regard to a palayam or Raj which was impartible. There is however nothing in the report to indicate as to whether the claim was by an illegitimate son. In *Muthuswami Jagavera Yettappa Naicker* v. *Venkateswara Yettaya*[2], there was a claim by the il egitimate son of the deceased zamindar against the successor zamindar for maintenance. The Courts in India decreed maintenance against the separate property of the zamindar in the hands of the successor. The Privy Council set aside that decree and remitted the matter for determination whether the maintenance could be paid out of income from the zamindari. The judgment of the High Court, after remand, is reported in *Coomara Yettappa Naicker* v. *Venkateswara Yettiya*[3]. The learned Judges observed that it was clear upon the authorities cited, namely, *Chuoturya Pun Marden Singh* v. *Shaub Purhulad Syn*[4], and *Naragunty Luchmeedevamah* v. *Vengama Naidoo*[1], that impartible family estate was a fund on which maintenance might properly be charged. The learned Judges mention the fact that the Advocate-General who appeared for the zamindar did not dispute that the course of decisions had settled that question. That decision makes it clear that the right of an illegitimate son of the previous zamindar to have his maintenance paid out of impartible estate was recognised from very early times. In *Maharaja of Venkatagiri* v. *Raja Rajeswara Rao*[5], a claim was made for maintenance by the illegitimate son of a junior member against the holder of an impartible estate on the basis of a grant made in favour of his putative father. The grant was construed as creating no rights in favour of an illegitimate issue. The learned Chief Justice held that there was no sufficient evidence in the case to prove a family or territorial custom. The claim in that case was not by the illegitimate son of a zamindar but by one born to a junior member. The learned Judges however upheld his claim on the basis that he was a member of the family. That was reversed by the Privy Council *Raja Krishnayachendra* v. *Raja Rajeswara Rao*[6]. *Guruswami Pandiyan* v. *Pandiya Chinna Tambiar*[7], was a case relating to the succession to the Sivagiri estate. In the course of the judgment Krishnan, J., stated that it had not been shown in that zamindari there was any customary right to maintenance. That observation was made to repel an argument, that certain maintenance grants were made in recognition of grantees right in the zamindari. The question of the illegitimate son's claim for maintenance did not arise in that case. As pointed out in *Thangavelu* v. *Court of Wards, Madras*[8], there had been no instance in which such a right was put forward and negatived. Indeed there was no such decision brought to our notice. Mr. Natesan, the learned counsel for the respondents, contended that the decisions in *Muthuswami Jagavera Yettappa Nacicker* v. *Venkateswara Yettaya*[2], and that reported in *Coomara Yettappa Naicker* v. *Venkateswara Yettiya*[3] were based on the theory that an illegitimate son, as a member of the family of his putative father, would be entitled to maintenance. That theory having been negatived by the later decisions in *Rama Rao* v. *Raja of Pithapur*[9], and in *Commissioner of Income-tax, Punjab* v. *Krishna Kishore*[10], it was contended that the basis of the earlier judgments was wrong, and they could no longer be relied on as validly recognising an illegitimate son's claim to maintenance. In other words it was said that the earlier cases proceeded not on any custom which was alleged or proved but on the principle of law that an illegitimate son was a member of the family and was therefore entitled to maintenance, and that the decision in *Thangavelu* v. *Court of Wards, Madras*[8], requires reconsideration. We do not agree. The illegitimate son's claim has undoubtedly been recognised all these years. The circumstance that the reason for the custom has subsequently been found to be wrong cannot affect its validity. It must be noticed that it is the usage which makes the law, and not the reason for such a usage.

1. (1861) 9 M.I.A. 66.
2. (1868) 12 M.I.A. 203.
3. (1870) 5 Mad. H.C.R. 405.
4. (1857) 7 M.I.A. 18.
5. I.L.R. (1939) Mad. 623.
6. (1942) 1 M.L.J. 132 : L.R. 68 I.A. 181 : I.L.R. (1942) Mad. 419 (P.C.).
7. (1920) 39 M.L.J. 529 : I.L.R. 44 Mad. 1.
8. (1946) 2 M.L.J. 143.
9. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
10. (1941) 2 M.L.J. 972 : L.R. 68 I.A. 155 : I.L.R. (1942) Lah. 1 (P.C.).

The essentials of a valid custom are that it should be continuous and uniform, not immoral or opposed to public policy and must have the qualities of antiquity and certainty. All these are present in the instant case. There is no further requirement under the law that a custom in order to be upheld should be deducible from any accepted principle of law. In *Thangavelu* v. *Court of Wards, Madras*[1], the learned Judges rejected a similar contention in these words :—

"A right which was considered to be indisputably established more than half a century ago and which is not shown to have since been denied or disputed in any decided case cannot, in our opinion, be over-thrown the strength of recently expounded theories regarding its basis".

We are in respectful agreement with that view. It would, therefore, follow that it is unnecessary for the appellants in the two appeals to adduce evidence of a custom, that they would be entitled to maintenance out of the impartible estate, as such custom has been so well recognised as to become part of the law.

On behalf of the appellant in S. T. A. No. 138 of 1954 reliance was placed on Exhibit A-1, as amounting to recognition of his right to maintenance from the impartible estate. Exhibit A-1 is a decision of the Magistrate on a reference by the Collector on behalf of the Court of Wards to settle the claim of maintenance of the appellants against their putative father, who was then alive. As the putative father would be liable personally to maintain his illegitimate sons, no inference could be drawn from the mere fact that maintenance was awarded to the appellant under Exhibit A-1. In view of our finding on the existence of a custom by which an illegitimate son of the proprietor of an impartible estate would be entitled to maintenance out of the zamindari, it is unnecessary to consider that matter further. On the finding that the appellants in both the appeals would be entitled to maintenance from the impartible estate, they would be entitled to a share in the amount allotted under section 45 (4) to the maintenance holders of the family.

The appeals are allowed to this extent. The order of the Tribunal is set aside and the matter is remanded for fixing the quantum of compensation payable to each of the appellants. The appellants will be entitled to recover their costs from the contesting respondents.

V.S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. Addison & Co., Ltd., Madras .. *Petitioner**

v.

The State of Madras represented by the Secretary to Government Revenue Department, Madras .. *Respondent.*

Madras General Sales Tax Act (IV of 1939) *and Constitution of India,* 1950, *Article* 286 (2)—*Sale by the assessee of motor cars to sub-dealers resident outside the State for sale outside the State—Delivery within the State—Purchase price—Should be included in the turnover and liable to tax—Section* 8-*B of Act (IV of* 1939)—*Amounts collected by way of sales tax from the consumer by the registered dealer—Should be included in the assessable turnover.*

The assessee firm sold the motor cars to its sub-dealers who resided outside the State of Madras and who were bound under the terms of the contract with the assessee firm to sell those cars within the respective areas all of which were outside the State of Madras. Those cars were however delivered to the sub-dealers or their agents at Madras and were subsequently taken by those sub-dealers outside the State for sale within their respective areas. Such sales completed by delivery within the State of Madras, though the sales were for subsequent transport of those cars to areas outside the State for further sales there, were intra-State sales within the State of Madras and were not sales in the

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1. (1946) 2 M.L.J. 143.

* T.R.C. No. 180 of 1956.

15th September, 1959.
(24th Bhadra, 1881, Saka).

course of inter-State trade within the scope of Article 286 (2) of the Constitution as it stood in the relevant year (assessment year 1951-52) before it was amended. The purchase price should be included in the assessable turnover.

The amounts collected by a registered dealer from the consumer by way of sales tax under section 8-B of Act (IV of 1939) should be included in the assessable turnover of the dealer.

Petition under section 12-B (1) of Madras General Sales Tax Act (*See* rule 130 (1) (*a*)) praying the High Court to revise the Order of the Court of the Sales Tax Appellate Tribunal, Madras, dated 26th December, 1955 and made in Tribunal Appeal No. 375 of 1955 (A-3-5-/51-52 dated 2nd May, 1953, Special Commercial Tax Officer for Appeals, Madras City).

K. V. Venkatasubramania Iyer and *V. Sethuraman,* for Petitioner.

The Government Pleader (*K. Veeraswami*), for Respondent.

The Order of Court was made by

Rajagopalan, J.—The assessee was a dealer in automobiles among other articles. Two of the items finally included by the Tribunal in the assessable turnover of the assessee for the assessment year 1951-52 were (i) Rs. 14,42,225-5-9 and (ii) the amounts collected by the assessee by way of tax under section 8-B of the Madras General Sales Tax Act—the exact amount has yet to be ascertained, as the Tribunal held that the Government were entitled to assess tax only at 3 pies per rupee. The first of these items represented the purchase prices paid to the assessee firm for the sale of motor cars to its sub-dealers, who resided outside the State of Madras and who were bound under the terms of their contract with the assessee to sell those cars within the respective areas, all of which were outside the State of Madras. Those cars were however delivered to the sub-dealers or their agents at Madras and were subsequently taken by those sub-dealers outside the State for sale within their respective areas.

The assessee contended before us, in his application preferred under section 12-B of the Act, that neither of these items should have been included in its assessable turnover.

Normally we should have held that the question, whether each of these items is assessable to sales tax, is concluded by the authority of prior decisions of this Court. It was held in *Ashok Leyland, Ltd.* v. *State of Madras*[1], that such sales completed by delivery of the cars within the State of Madras, though the sales were for subsequent transport of those cars to areas outside the State for further sales there, were intra-State sales within the State of Madras and were not sales in the course of inter-State trade within the scope of Article 286 (2) of the Constitution, as it stood in the relevant year before it was amended. The principle applied in *Ashok Leyland case*[1], was the one laid down in the earlier decisions of this Court, *Indian Coffee Board* v. *State of Madras*[2] and *State of Madras* v. *Indian Coffee Board*[3]. If the principle thus reaffirmed in *Ashok Leyland case*[1], were to apply, the contention of the assessee will have to be negatived in this case also. Similarly, if the principle laid down in *Sundararajan & Co., Ltd.* v. *State of Madras*[4], and reaffirmed in the unreported decision of this Court in T. R.C. No. 46 of 1955, etc., and again in *State of Madras* v. *Bangalore Automobiles*[5], were to apply, the second of the contentions of the assessee, that the amount collected by the assessee under section 8-B by way of tax should not be included in its assessable turnover, will also have to be rejected.

The endeavour of Mr. Venkatasubramania Ayyar learned counsel for the assessee petitioner was to convince us that those earlier decisions of this Court, to each of which one of us was a party, required reconsideration. We have heard him in full as if the questions at issue were *res integra.* We are, however, unable to accept his contention that those decisions require reconsideration. We should also men-

1. (1956) 8 S.T.C. 210.
2. (1955) 7 S.T.C. 135.
3. (1956) 2 M.L.J. 324 : I.L.R. (1957) Mad. 55 : (1956) 7 S.T.C. 522.
4. (1956) 1 M.L.J. 339 : I.L.R. (1956) Mad. 1123 : (1955) 7 S.T.C. 105.
5. (1956) 2 M.L.J. 309 : I.L.R. (1957) Mad. 147 : (1956) 7 S.T.C. 537.

tion that the decision of this Court in *Ashok Leyland case*[1], is under appeal to the Supreme Court. In these circumstances we do not consider it necessary to discuss in full all the contentions the learned counsel urged before us.

As we said, *Ashok Leyland case*[1], is a direct decision of this Court on one of the two questions at issue, whether the sales of the motor cars were intra-State sales or were sales in the course of inter-State trade or commerce within the meaning of Article 286 (2) of the Constitution as it stood before it was amended. The principle, that a sale completed by the delivery of the goods within the State to the buyer or his agent was not a sale in the course of inter-State trade or commerce even if the buyer bought the goods solely for transporting them outside the State and did transport them, was based among other things to a large extent on the interpretation placed by the Supreme Court on the scope of the expression:

> " In the course of the import of the goods into, or export of the goods out of, the territory of India "

within the meaning of Article 286 (1) (*b*) of the Constitution. It must be held that the scope of Article 286 (1) (*b*) has been finally settled by the Supreme Court. What was laid down by the majority of the Judges in the *State of Travancore-Cochin* v. *S. V.C. Factory*[2], that a sale and purchase within the State for the purposes of exporting those goods was not a sale in the course of export, was reaffirmed by the Supreme Court in *State of Madras* v. *Guruviah Naidu*[3], and *State of Mysore* v. *Mysore Spinning and Manufacturing Co., Ltd*[4]. We are still of the view that the expression " in the course of" should have the same significance when it related to export and import trade to which Article 286 (1) (*b*) of the Constitution applied and also when it related to inter-State trade or commerce which was regulated in the relevant period by Article 286 (2) as it stood before it was amended.

Mr. Venkatasubramania Ayyar referred to *The Queen* v. *Wilkinson, Ex parte Brazell, Garlick & Company*[5], the principles laid down in which were quoted with approval by Das, J., as he then was, in his separate and dissenting Judgment in *State of Travancore-Cochin* v. *S. V. C. Factory*[2]. Mr. Venkatasubramania Ayyar urged that neither that decision nor the observations of Das, J., were considered in any of the three decisions of this Court including that in *Ashok Leyland case*[1]. Even so, we are unable to accept his contention that those decisions require reconsideration.

No doubt in *The Queen* v. *Wilkinson, Ex parte Brazell, Garlick & Company*[5] despite the fact that the goods in question, potatoes were delivered at Dorrigo to the buyer's agent within the State of New South Wales for being consigned to Queensland for sale, the High Court of Australia came to the conclusion, that it was a sale in the course of inter-State trade. The learned Judges of the Australian High Court observed :

> " the delivery of the potatoes from the lorry into the railway truck can bear only the aspect of an essential and intergral, even if initial, step in the transportation of the potatoes to Queensland."

In that case the principle laid down by Dixon, J., in an earlier decision *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board*[6], was reaffirmed.

> " We should consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade, which, apart from theoretical legal possibilities, must commercially involve transfer from one State to another."

What arose for decision in *State of Travancore-Cochin* v. *S. V. C. Factory*[2], was that was a sale in the course of export within the meaning of Article 286 (1) (*b*) of the Constitution. It was in considering that question that Das, J., as he then was, referred to *The Queen* v. *Wilkinson, Ex parte Brazell, Garlick & Company*[5], to explain the scope of the "expression in the course of" though the *Australian case*[5] itself dealt with a sale in the course of inter-State trade. It was apparently after

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1. (1956) 8 S.T.C. 210.
2. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 : (1953) 4 S.T.C. 205 : A.I.R. 1953 S.C. 333 (S.C.).
3. (1955) 6 S.T.C. 717.
4. (1958) 9 S.T.C. 188.
5. 85 C.L.R. 467.
6. 98 Law. Ed. 1035 at 1046.

considering this case also that the majority of the learned Judges held in *State of Travancore-Cochin* v. *S. V. C. Factory*[1], that a sale for export was not a sale in the course of export within the scope of Article 286 (1) (*b*). That principle was reaffirmed by Das, J., himself as Acting Chief Justice, in *State of Madras* v. *Guruviah Naidu*[2], in explaining the scope of the expression "in the course of". We feel bound by the principles laid down by the Supreme Court, though those decisions were with reference to sales within the scope of Article 286 (1) (*b*) of the Constitution. We do not feel justified at this stage in enlarging the scope of the expression "in the course of" only in relation to inter-state trade and commerce on the lines explained in *The Queen* v. *Wilkinson, Ex parte Brazell, Garlick & Company*[3]. We are unable to apply to this stage the test of commercial significance of the transaction postulated by the Australian High Court in the earlier decision and reaffirmed in *The Queen* v. *Wilkinson, Ex parte Brazell, Garlick & Company*[3].

Learned counsel referred to the test laid down by the Supreme Court of America in *Phillips Petroleum Company* v. *State of Wisconsin*[4], where the goods were destined for consumption in a State outside the one in which the goods were sold. In view of what we have said earlier, we feel unable to apply this test either in deciding the question at issue whether the sales of the motor cars were sales in the course of inter-State trade or commerce.

In *State of Madras* v. *K. H. Chambers, Ltd.*[5], the Learned Chief Justice referred to *State of Travancore-Cochin* v. *S. V. C. Factory*[1], and observed :

"I must confess that but for the authoritative pronouncement of the Supreme Court in the *Second Travancore case*,[1] I would have felt considerable difficulty in the construction of Article 286 (1) (*b*) in its application to sales or purchases immediately preceding the actual exports, which are related to the export factually. For instance, when a dealer in the State, to perform a contract of sale, entered into with a foreign buyer, purchases the goods which he subsequently exports, it may well be held that the purchase was in the course of the export. Indeed, one of the learned Judges of the Supreme Court, Das, J., took that view, though the majority took a contrary view. But the learned Chief Justice of India, who delivered the judgment on behalf of the majority, took up this very question and held that such a purchase would not be covered by the exemption. This is conclusive on this question."

It is on similar considerations we have to hold that it is not permissible at this stage to decide the question at issue, even with reference to Article 286 (2) of the Constitution as it stood then, by applying either the Australian test or the American test to which we have referred earlier. We accept the law laid down in *Ashok Leyland case*,[6] as correct. It is authority binding on us. We hold that the Tribunal rightly included this item of Rs. 14,42,225-5-9 in the assessable turnover of the assessee.

The next question is whether *Sundararajan & Co., Ltd.* v. *State of Madras*[7], requires reconsideration. In January, 1954, this Court held in *Deputy Commissioner of Commercial Taxes* v. *Krishnaswami Mudaliar*[8], that under the scheme of the Act, including section 8-B as it stood, the amounts collected by a registered dealer from the consumer by way of sales tax and paid over to the Government should not be included in the turnover of the registered dealer as part of the sale price of the goods sold, and that those amounts were not liable to be taxed over again to sales tax. Subsequent to that the Madras Legislature enacted the Madras General Sales Tax (Defintion of Turnover and Validation of Assessments) Act, 1954, section 2 of which directed that the amounts so collected under section 8-B shall be deemed to have formed part of the turnover. The validity of that Act was challenged, but, it was upheld by a Divsion Bench of this Court in *Sundararajan & Co., Ltd.* v. *State of Madras*[7]. If that decision prevails and the validity of the Act is to be upheld, then the Tribunal was right in including this item also in the assessable turnover of the assessee in the year of assessment in question.

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1. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 : (1953) 4 S.T.C. 205 : A.I.R. 1953 S.C. 333 (S.C.).
2. (1955) 6 S.T.C. 717.
3. 85 C.L.R. 467.
4. 98 Law Ed. 1035 at 1046.
5. (1955) 2 M.L.J. 63 : I.L.R. (1955) Mad. 579 : (1954) 6 S.T.C. 157 at 172.
6. (1956) 8 S.T.C. 210.
7. (1956) 1 M.L.J. 339: I.L.R. (1956) Mad. 1123: 1955) 7 S.T.C. 105.
8. (1954) 2 M.L.J. 151 : 5 S.T.C. 88.

The main contention of Mr. Venkatasubramania Ayyar was that Act XVIII of 1954 was beyond the legislative competence of the Madras Legislature. That was the very contention negatived in *Sundararajan & Co., Ltd.* v. *State of Madras*[1].

Learned counsel referred to the well-recognised principle reaffirmed by the Privy Council in *Motor Transport Commissioner* v. *Antil Ranger & Co. (Pty.) Ltd.*,[2], that a legislature cannot give itself legislative power to tax something if in reality it did not have that legislative competence.

Learned counsel urged that what section 8-B of the Act provided for was the collection of a tax, and, if what was collected was a tax, it could not be brought within the scope of Entry 54 of List II of Schedule VII of the Constitution. In dealing with a similar contention what was recorded in *Sundararajan's case*[1] was,

> " Even if the registered dealer collects the amount by way of tax under the authority of section 8-B of the Act, the payment is by the purchaser on the occasion of the sale by the dealer *vis-a-vis* the dealer it is in reality part of the price the purchaser has to pay the seller for purchasing the goods. A tax on such a payment, in our opinion, is well within the abmit of Entry 54 of List II, Schedule VII, read with Article 246 (3) of the Constitution."

It was pointed out there that it is not the label that the Legislature gave at one stage that really concluded the question at issue. Therefore, when section 8-B of the Act declared that the amounts were collected by way of tax, that did not conclude the question at issue. What was the real nature of the payment has to be taken into account in deciding whether it came within the ambit of Entry 54. Learned counsel referred to the observations of Venkatarama Ayyar, J., in *Bengal Immunity Co., Ltd.* v. *The State of Bihar*[3]. After pointing out that the incidence of taxation ultimately fell on the consumer the learned Judge recorded :

> " As the seller is merely to pass on the tax to the consumer, he is, in fact, constituted collector of the tax on behalf of the State."

The learned Judge was only explaining the reality of the situation with reference to the economic incidence of the tax.

We are now concerned with the question whether what was so passed on could ever be part of the price the consumer has to pay and which could be correlated to the bargain or transaction of sale itself. That aspect we feel was considered in full in *Sundararajan's case*[1], and we are unable to hold that the view taken was erroneous or that it requires reconsideration. We are bound to follow the authority of the earlier decision, and we hold that the Tribunal rightly included this item also in the assessable turnover of the assessee.

The petition fails and is dismissed with costs. Counsel's fee Rs. 250/.

V.S. — *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE JAGADISAN.

M. Shaik Dawood .. *Petitioner**

v.

The Collector of Central Excise, Madras .. *Respondent.*

Sea Customs Act (VIII of 1878), section 167 (8)—Construction—Punishment prescribed under—If limited to Rs. 1,000—Option of customs authorities—Interpretation of statutes—Construction requiring addition of words into Act—Permissibility—Statute prescribing alternative punishments—Rule—Precedents—Value and binding force of.

The amount of Rs. 1,000, specified in the third column of section 167 (8) of the Sea Customs Act, is not the maximum limit of penalty which can be imposed by the Customs Authorities. It is

1. (1956) 1 M.L.J. 339: I.L.R. (1956) Mad. 1123: (1955) 7 S.T.C. 105.
2. L.R. (1956) A.C. 527.
3. (1955) 2 M.L.J. 168 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : (1955) 6 S.T.C. 446: A.I.R. 1955 S.C. 661 (S.C.).

* W.P. No. 382 of 1958.

20th April, 1960.
(31st Chaitra, 1881—Saka).

clear that the customs authorities are given the alternatives and it is left to them to impose a penalty which satisfied the first condition or the second.

Collector of Customs, Madras v. *Rahiman*, (1957) 1 M.L.J. (Crl.) 283 : (1957) 2 M.L.J. 41 : I.L.R. (1957) Mad. 642 ; *Venkatanarayana Iyer* v. *Collector of Central Excise, Madras*, (1955) 2 M.L.J. 115 and *M/s. Mohandas Issardas* v. *A. N. Sattanathan*, I.L.R. (1955) Bom. 318, approved.

Maqbool Hussain v. *The State of Bombay*, (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730 ; *Babulal Amthalal Mehta* v. *The Collector of Customs, Calcutta*, (1957) M.L.J. (Crl.) 765 : (1957) S.C.J. 828 : 1957 S.C.R. 1110 and *F. N. Roy* v. *Collector of Customs, Calcutta*, (1957) M.L.J. (Crl.) 684 : (1957) S.C.J. 734 : 1957 S.C.R. 1151, explained.

Leo Roy v. *The Superintendent, District Jail, Amritsar*, (1958) M.L.J. (Crl.) 289 : (1958) S.C.J. 301 : 1958 S.C.R. 822 ; *Thomas Dana* v. *State of Punjab*, (1959) M.L.J. (Crl.) 474 : (1959) S.C.J. 699 and *Parliwala Bros. Ltd.* v. *Collector of Customs*, A.I.R. 1958 Cal. 232, referred to.

A precedent is a judicial decision which contains in itself a principle. The authoritative element, which is the underlying principle is called the ratio *decidendi*. While the concrete decision is binding between the parties to it, the abstract *ratio decidendi* alone has the force of law as regards the world at large. The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon shich the case was decided.

Judicial declaration unaccompanied by judicial application is not of binding authority. *Obiter dicta*, though they may have great weight as such, are not conclusive authority.

Salmond on Jurisprudence, 11th edition, pages 223 and 224, *Flower* v. *Elbow Vale Steel, Iron and Coal Co.*, L.R. (1934) 2 K.B. 132 and Stroud's Judicial Dictionary, cited.

A construction, which requires fresh words to be introduced into a statute, is not to be readily adopted. When a statute provided for alternative punishments, a choice between the two punishments must naturally be made. It is never intended that the choice of the punishment should be left to the person who has been found guilty of having transgressed the law. That option must naturally vest in the person administering the law. When the legislature in section 167 (8) of the Sea Customs Act prescribed that the penalty shall not exceed three times the value of the goods, it was making a deliberate effort to make the penalty proportionate to the value of the goods involved ; to fix the ceiling at Rs. 1,000, would be to defeat this effort of the legislature.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the proceedings of the respondent the Collector of Central Excise, Madras, dated 28th October, 1957, in D.A. Dis. VIII/10/215-57/C-2, 132215 and quash the same.

S. M. Cassim, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The case came on for hearing before Rajagopala Iyengar, J., who made the following

ORDER OF REFERENCE†—This is a petition for the issue of a writ of *certiorari* to quash an order of the Collector of Central Excise, Madras, whereby a penalty of Rs. 5,000 was levied against the petitioner for violation of section 167 (8) of the Sea Customs Act.

The petitioner landed at Nagapattinam from Penang in October, 1957 and brought with him 84 wrist watches valued at Rs. 4,200. He held no permit for their importation and these goods were concealed. They were seized by the Superintendent of Central Excise at Nagapattinam. Thereafter he was served with a notice to show cause why (1) the wrist watches should not be confiscated and (2) why a penalty should not be imposed on him under section 167 (8) of the Sea Customs Act. As there was no dispute that the petitioner had smuggled these goods into India, the Collector ordered their confiscation and also imposed the penalty. The penalty that he imposed was as stated earlier, the payment of a sum of Rs. 5,000. Though in the petition the validity of the order of confiscation was also challenged this ground has now been abandoned and the only point urged before me was as regards the legality of the amount of personal penalty to which the petitioner was subjected.

The point urged turns upon the proper construction of the third column of section 167 (8) of the Sea Customs Act. Section 167 sets out in three columns the offences and the penalties that might be imposed by the departmental authorities. The first column of the section sets out the offence, the second the number of the sec-

† 1st October, 1959.

tion to which offence has reference and the last column sets out the penalty that might be imposed. There is no dispute that the petitioner was guilty of the offence of importation of goods into India contrary to the prohibition or restriction imposed by section 18 or 19 of the Sea Customs Act. What is however relevant for the purpose of the present petition is the third column which reads :

> "such goods shall be liable to confiscation ; any person concerned in any such offence shall be liable to a penalty not exceeding three timees the value of the goods or not exceeding one thousand rupees."

It would be seen that there are two limits laid down by this section as to the amount of penalty that could be imposed. One is that the penalty shall not exceed three times the value of the goods and the other is that it shall not exceed Rs. 1,000. It is common knowledge that this section was derived from its counterpart of the provision in the U.K. Act 39, and 40 Victoria, Chapter XXXVI, section 186, wherein it is clearly laid down that the customs authority is at its option entitled to levy penalty at the higher figure. In other words, the construction that the department put upon this provison was to read it as if it contained the words " whichever is higher ."

Bhagwati, J., however delivering the judgment of the Constitutional Bench of the Supreme Court in *Maqbool Hussain* v. *The State of Bombay*,[1] observed (at page 742) after referring to the terms of section 167 (8) and the investigation and adjudication under the Sea Customs Act :

> " Even though the customs officers are invested with the power of adjudging confiscation, increased rates of duty or penalty, the highest penalty which can be inflicted is Rs. 1,000 ".

The question immediately arose as to whether this decision should be taken to have authoritatively laid down the construction of section 167 (8) of the Sea Customs Act as if that provision contained the words " whichever is lower ", instead of " whichever is higher " as previously understood. A Bench of the Bombay High Court *Mohandas Issardas* v. *A. N. Sattanathan*[2], had to consider this point and the Court was pressed with the observation in the judgment of Bhagwati, J., which I have extracted. Chagla, C.J., however, held that the proper interpretation of section 167 (8) of the Sea Customs Act never arose before the Supreme Court and it treated it as a casual observation which though entitled to great respect as being in the judgment of the Supreme Court could not be taken to have laid down the law. On this ground the Division Bench held that a penalty which exceeded Rs. 1,000 was not beyond the competence of the Customs authorities. The identical question came up before this Court in *The Collector of Customs, Madras* v. *Rahiman*[3]. The observations of Bhagwati, J., were relied on by counsel who appeared for the person against whom penalty was levied. The learned Chief Justice who delivered the judgment of the Bench said (at page 53) :

> " With great respect we cannot agree that Bhagwati, J., by this sentence meant to decide the question which now falls for decision. In the case before the Supreme Court no question ever arose with regard to the interpretation of section 167 (8)........We therefore hold that the amount of Rs. 1,000 is not the maximum limit of the penalty which can be imposed by the customs authorities."

The matter has again come up before this Court on several occasions and the view that has been consistently taken is in accordance with the decision of the Bench to which I have referred. There is also another decision of a Division Bench to which in this connection I might advert. *Venkatanarayana Iyer* v. *Collector of Central Excise, Madras*[4], which was decided in September, 1957 was an appeal from my decision in W.P. No. 655 of 1957. The appeal was dismissed at the stage of admission and at that stage a judgment of a learned Judge of the Calcutta High Court holding that Rs. 1,000 was the maximum penalty that could be levied was cited to the learned Judges Panchapakesa Ayyar and Ganapatia Pillai, JJ. But the Bench, however, stating that " the judgment of a single Judge of the Calcutta High Court cannot prevail over the judgment of a Bench of this Court " dismissed the appeal.

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1. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730 (S.C.).
2. I.L.R. (1955) Bom. 318.
3. (1957) 2 M.L.J. 41.
4. (1958) 2 M.L.J. 115.

Learned counsel for the petitioner, however, now relies upon the passage in the observations of the Supreme Court in two decisions rendered subsequent to the decision in *Collector of Customs, Madras* v. *Rahiman*[1], the judgment was delivered on 16th November, 1956, as indicating that in the view of the Supreme Court the maximum penalty that could be levied under section 167 (8) was Rs. 1,000. The first of these decisions is *Babulal Amthalal Mehta* v. *Collector of Customs, Calcutta*[2], a judgment which was delivered by Govinda Menon, J., on 8th May, 1957. In this decision dealing with section 167 of the Sea Customs Act, the learned Judge said at page 1116 :

"The penalty of confiscation is provided in the third column of entry No. 8, if any goods, the importation or exportation of which is prohibited or restricted, are imported contrary to such prohibition or restriction. It lays down that in addition to the confiscation of the goods, the persons concerned shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees. This Court has held that the minimum is the alternative. See *Maqbool Hussain* v. *The State of Bombay*[3]."

Though the passage is obscure it looks as if the learned Judge meant to repeat what Bhagwati, J., had observed as regards the scope of section 167 (8) in the earlier decision to which reference was made. The other decision which was rendered on 16th May, 1957, was *F. N. Roy* v. *Collector of Customs, Calcutta*[4], and the Bench consisted of the same five learned Judges who constituted the Bench which decided *Babulal Amthalal Metha's case*[2]. The judgment of the Court on this occasion was delivered by Sarkar, J. This learned Judge stated at page 1158 of the report :

"Another similar argument was that section 167, Item 8, of the Sea Customs Act iteself offended Article 14 in that it left to the uncontrolled discretion of the Customs authorities to decide the amount of the penalty to be imposed. The section makes it clear that the maximum penalty that might be imposed under it is Rs. 1,000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion."

I have only to point out that it does not appear as if the decision of this Court in *Collector of Customs, Madras* v. *Rahiman*[1], was brought to the notice of the learned Judges of the Supreme Court when these two decisions were rendered.

In view of the observations contained in these two decisions of the Supreme Court, I consider that the decision in *Collector of Customs, Madras* v. *Rahiman*[1], requires reconsideration. The papers in this case are therefore directed to be placed before my Lord the Chief Justice for the proper interpretation of section 167 (8) of the Sea Customs Act by a Full Bench of this Court. There will be an order accordingly.

When the case came on for hearing before a Full Bench consisting of Balakrishna Ayyar, Ramachandra Iyer and Jagadisan, JJ., the Order of the Court was made by

Balakrishna Ayyar, J.—On 13th October, 1957, the petitioner Shaik Dawood landed in Nagapattinam from Penang. The Customs Officers searched his luggage and seized 84 wrist-watches valued at about Rs. 4,200 which he had smuggled into the country without a permit. For this offence the petitioner was prosecuted before the Sub-Divisional Magistrate, Nagapattinam, who, accepting his plea, of guilty, convicted him under section 5 read with section 3 (2) of the Import and Export (Control) Act, 1947 and Import (Control) Order, 1955, and sentenced him to undergo rigorous imprisonment for six weeks. The petitioner appealed to the Sessions Judge, East Tanjore. But that appeal was dismissed.

On 13th October, 1957, that is to say, the very day on which the watches were seized from him, a notice was served on the petitioner by the Superintendent of Central Excise, Nagapattinam, to show cause (1) why the 84 wrist-watches should not be confiscated under section 167 (8) of the Sea Customs Act read with section 3 (2) of the Import and Export (Control) Act, 1947, and (2) why a penalty should not also be imposed on him under section 167 (8) and (40) of the Sea Customs Act.

1. (1957) 2 M.L.J. 41 : (1957) M.L.J. (Crl.) 283 : I.L.R. (1957) Mad. 642.
2. (1957) M.L.J. (Cr.) 765 : (1957) S.C.J. 828 : 1957 S.C.R. 1110.
3. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730, 742 (S.C.).
4. (1957) M.L.J. (Crl.) 684 : (1957) S.C.J. 734 : 1957 S.C.R. 1151 (S.C.).

To this the petitioner sent no reply. On 24th January, 1958, while the petitioner was still in tne Central Jail, Tiruchirapalli, serving out the sentence which had been imposed upon him by the Sub-Divisional Magistrate, the Collector of Central Excise, Madras, passed an order confiscating all the 84 wrist-watches and imposing on him a penalty of Rs. 5,000. The complaint of the petitioner is that the order of the Collector of Central Excise, confiscating the 84 wrist-watches and also imposing penalty of Rs. 5,000 is contrary to law and beyond the jurisdiction of the Collector of Centrl Excise. He has, therefore, filed this petition for the issue of an appropriate writ to quash the order of the Collector of Central Excise, Madras.

This petition came on for hearing before Rajagopala Ayyangar, J. Before him the ground that the order of confiscation of the watches was illegal was abandoned. It was, however, urged before him that under section 167 (8) of the Sea Customs Act the maximum penalty that could have been imposed upon the petitioner was only Rs. 1,000 and that the imposition of a penalty of Rs. 5,000 was in contravention of the law.

In *Collector of Customs Madras* v. *Rahiman*[1], a Bench of this Court held :

> " On a proper construction of the third column of section 167 (8) of Act VIII of 1878, the amount of Rs. 1,000 specified therein is not the maximum limit of penalty which can be imposed by the Gustoms authorities. The word " or " makes it perfectly clear that the Customs authorities are given the alternatives and it is left to them to impose a penalty, which satisfied either the first condition or the second."

The same question came up again in *Venkatanarayana Iyer* v. *Collector of Central Excise, Madras*[2], where the same view was taken. So far as we can ascertain this view has been consistently followed in this Court. But, in the cases, to which we shall presently refer, the Supreme Court has made certain observations in view of which Rajagopala Ayyangar, J., was inclined to think that the decision in *Collector of Customs, Madras* v. *Rahiman*[1], requires reconsideration and so he referred this case to a Full Bench. That is how the matter comes up before us.

We may mention here that the same question has been raised in W. P. Nos. 924 928, 979 and 980 of 1959 and we have also heard the learned counsel for the petitioners in these petitions as to the proper interpretation of section 167 (8) of the Sea Customs Act. That sections runs as follows :

" The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :—

Offences.	*Section of the Act to which offence has reference.*	*Penalties.*
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction, or If any attempt be made so to import or export any such goods, or If any such goods be found in any package produced to any officer of Customs as containing no such goods, or If any such goods, or any dutiable goods be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India, or if any goods, the exportation of which is prohibited or restricted as aforesaid be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.	18 & 19	Such goods shall be liable to confiscation ; any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

1. (1957) 2 M.L.J. 41 : (1957) M.L.J. (Crl.) 283 : I.L.R. (1957) Mad. 642.
2. (1958) 2 M.L.J. 115.

We shall immediately refer to the decisions of the Supreme Court on the strength of the observations in which the contention was put forward that Rs. 1,000 is the maximum penalty that can be imposed under any circumstances whatever for a contravention of the provisions of section 167 (8) of the Sea Customs Act. The earliest of these in *Maqbool Hussain* v. *The State of Bombay*[1]. The facts of the case, so far as they are at present material, were as follows : On 6th November, 1949, one Maqbool Hussain, a citizen of India, arrived in Santa Cruz airport from Jeddah. On landing he did not declare that he had brought any gold with him, but on search it was found that he had brought in 107.2 tolas of gold in contravention of a notification of the Government of India, dated 25th August, 1948. The Customs authorities confiscated the gold by an order, dated 19th December, 1949. The owner of the gold was, however, given the option to pay in lieu of such confiscation a fine of Rs. 12,000. That option was not exercised. In March, 1950, a complaint was filed in the Court of the Chief Presidency Magistrate, Bombay, against Maqbool Hussain charging him with having committed an offence under section 8 of the Foreign Exchange Regulation Act of 1947 read with the notification dated 25th August, 1948. Maqbool Hussain took the contention that the prosecution was barred in view of the fact that the Customs authorities had already passed an order confiscating the gold. He filed a petition in the High Court of Bombay under Article 228 of the Constitution praying that the case be withdrawn from the file of the Chief Presidency Magistrate to the High Court and that the High Court might either dispose of the case itself or determine the question of law which he had raised. After various proceedings which are not of present interest the High Court of Bombay dismissed the petition of Maqbool Hussain. Maqbool Hussain then obtained Special Leave and appealed to the Supreme Court. In the course of a long judgment Bhagwati, J., observed :

> "Even though the Customs Officers are invested with the power of adjudging confiscation, increased rates of duty or penalty the highest penalty which can be inflicted is Rs. 1,000."

Now it is perfectly clear that the question what the maximum penalty is which can be imposed under section 167 (8) of the Sea Customs Act was never before their Lordships at all. The question which the Court had to decide was thus formulated : See pages 733 and 734 of the report :

> " The question that arises for our determination in this appeal is whether by reason of the proceedings taken by the Sea Customs Authorities the appellant could be said to have been prosecuted and punished for the same offence with which he was charged in the Court of the Chief Presidency Magistrate, Bombay ".

This was the only question before the Court; it was answered in the negative. The passage on page 742 on which learned counsel for the petitioner placed so much reliance was only a casual observation.

The same view of this decision was taken in *Messrs. Mohandas Issardas* v. *A. N. Sattanathan*[2]. At page 327, Chagla, C.J., observed as follows :—

> " Therefore, with respect, this observation is not an *obiter dictum* in the sense in which we have indicated. It was not an expression of opinion on a point that arose before the Supreme Court. It is again with very great respect—a casual observation made in considering the whole scheme of the Sea Customs Act."

The next case referred to by cunsel for the petitioner is reported in *Babulal Amthalal Metha* v. *The Collector of Customs, Calcutta*[3]. The facts there were as follows. On 4th May, 1955, the Rummaging Inspector (Intelligence), Customs House, Calcutta, searched the residential room of one Babulal Amthalal Mehta and in a wall almirah there discovered an old jacket wherein had been concealed 475 pieces of diamonds. The explanation of Babulal that he had received them from Messrs. Ratilal Amritlal not having been accepted the Collector of Customs issued a notice to the petitioner, and, after considering the entire material, he passed an order on 12th September, 1955, the scope and effect of which are thus set out in the judgment :

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1. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730 (S.C.).
2. I.L.R. (1955) Bom. 318.
3. (1957) 1 M.L.J. (Crl.) 765 : (1957) S.C.J 828 : 1957 S.C.R. 1110.

"Since the petitioner had failed to discharge the onus under section 178-A of the Sea Customs Act in respect of the diamonds seized on May 4, 1955, orders had been passed confiscating the same under sections 167 (8) and 167 (39) of the Sea Customs Act and that the confiscation would be absolute in terms of the provisions of section 3 (2) and 4 of the Imports and Exports (Control) Act, 1947. The reasons given in the above order were that the subsequent statements were contrary to what had been stated in the first instance, that at the time of the raid, an attempt was made to hide the diamonds in a suspicious manner and lastly that the petitioner was making statements which were in the nature of an afterthought, and not supported by facts. On account of these and other reasons, the Collector was of the opinion that the presumption under section 178-A had not been rebutted. The order stated that an appeal against it lay to the Central Board of Revenue within three months of the date of the despatch and also contained information as to the Court-fee stamps, etc., which would have to be affixed. Without availing himself of that remedy the petitioner has come up to this Court by way of an application for a writ under Article 32 of the Constitution."

The Court dismissed the petition. In the course of the judgment Govinda Menon, J., referring to section 167 (8) of the Sea Customs Act observed :

"It lays down that in addition to the confiscation of the goods, the persons concerned shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees. This Court has held that the minimum is the alternative. See *Maqbool Hussain* v. *The State of Bombay*[1]."

It will be noticed that the scope of section 167 (8) of the Sea Customs Act was never before the Supreme Court at all in this case either. The only question before the Court was whether the provisions of section 178-A offend against Article 14 of the Constitution, and, that question was answered in the negative. The passage from the judgment of Govinda Menon, J., which we have quoted and on which the learned counsel for the petitioner naturally laid emphasise was only a passing reference to an earlier case in which too the question did not arise. Further it is apparent from an examination of the earlier case in *Maqbool Hussain* v. *The State of Bombay*[1], that this observation of Govinda Menon, J., is not very accurate and is possibly the result of a misapprehension.

The third case referred to by learned counsel is reported in *F. N. Roy* v. *Collector of Customs, Calcutta*[2]. F. N. Roy, the petitioner in that case, imported from Japan zip-chains of the value of Rs. 11,000 and odd. He paid for the goods, but before he could clear them, the Assistant Collector of Customs for Appraisement, served on him a notice that he did not possess a valid import licence for the goods in question and required him to show cause why the goods should not be confiscated and action taken against him under section 167 (8) of the Sea Customs Act. Eventually after considering the representations of the petitioner the Collector of Customs made an order confiscating the goods and imposing a penalty of Rs. 1,000. The petitioner exhausted his departmental remedies and thereafter went up to the Supreme Court. The point taken before the Supreme Court will appear from the following passage which we quote from the judgment of Sarkar, J. :

"The petitioner has now applied to this Court under Article 32 of the Constitution challenging the validity of the order made against him. Learned counsel for the petitioner did not challenge the decision of the Customs authorities that the goods were not covered by the notification of March 16, 1953. He conceded that he could not do so in this application. Nor did he challenge the Customs authorities' power to confiscate the goods. Learned counsel, however, challenged the order of confiscation because it did not give the petitioner an option to pay a fine in lieu of confiscation."

It will be noticed that in that case the amount of penalty imposed was only Rs. 1,000 and so the question whether the appropriate Customs Officers could impose a penalty in excess of Rs. 1,000 did not arise for consideration at all. The only point the Court had to decide was whether the petitioner was entitled to the option of paying a fine in lieu of confiscation. It is no doubt true that on page 1158 the learned Judge observed :

"The section makes it clear that the maximum penalty that might be imposed under it is Rs. 1,000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion Furthermore, the discretion is vested in high Customs Officers and there are appeals from their order."

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1. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : 1953 S.C.R. 730.

2. (1957) M.L.J. (Crl.) 684 : (1957) S.C.J. 734 : 1957 S.C.R. 1151.

From what we have just said it will have become apparent that the only question before the Court was as regards the scope of section 183 and that the scope of section 167 (8) was not before the Court at all.

It will be convenient at this stage to refer to two other decisions of the Supreme Court. Of these one is reported in *Leo Roy Frey* v. *The Superintendent, District Jail, Amritsar*[1]. The relevant facts of that case were as follows. One Leo Roy Frey and another Thomas Dana arrived in India on 11th June, 1957. After staying in various places in India they left Delhi in a car for Amritsar on 22nd June, 1957. On 23rd June, 1957, they arrived at a Customs Station between India and Pakistan. The Customs Officers required the petitioners to fill in the usual declaration forms. Thereafter a very intensive search was carried out and then a pocket radio and a time-piece were recovered from Dana and pistol with 48 live-cartridges was recovered from Frey. Both of them were then placed under arrest. On 30th June, 1957, they were further interrogated and their car was thoroughly searched. It was then discovered that there was a secret chamber in that car containing Indian currency of the value of Rs. 8,50,000 and U. S. dollars "amounting to 10,000." Notices were served on Frey and Dana, and, after hearing their representations, the Collector of Central Excise made an order confiscating the currency notes and the motor car. The petitioner Dana was given an option to redeem the car on payment of Rs. 50,000. A penalty of Rs. 25,00,000 was imposed on each of the petitioners under section 167 (8). Thereafter the petitioners were prosecuted before the Additional District Magistrate, Amritsar, under section 23 read with section 8 of the Foreign Exchange Regulations Act, 1947 and section 167 (81) of the Sea Customs Act, 1878. The legality of the prosecution was thereupon questioned. It was contended on behalf of the petitioner that in view of the provisions of Article 20 (2) of the Constitution they could not be prosecuted and punished twice for the same offence, once before the Customs authorities and again before the Magistrate. This contention was overruled. The Court observed on page 828 :

> " It is true that the Collector of Customs has used the words " punishment " and " conspiracy ", but those words were used in order to bring out that each of the two petitioners was guilty of the offence under section 167 (8) of the Sea Customs Act. The petitioners were not and could never be charged with criminal conspiracy before the Collector of Customs and therefore Article 20 (2) cannot be invoked. In this view of the matter it is not necessary for us, on the present occasion, to refer to the case of *Maqbool Hussain* v. *The State of Bombay*[2], and to discuss whether the words used in Article 20 do or do not contemplate only proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal as ordinarily understood. In our opinion, Article 20 has no application to the facts of the present case. No other points having been urged before us, these applications must be dismissed."

On page 827 the following observations, however, appear :

> " No question has been raised as to the maximum amount of penalty that can be imposed under section 167 (8) and we are not called upon to express any opinion on that point."

This passage is significant for two reasons. It is clear that the decision of this Court in *Collector of Customs, Madras* v. *Rahiman*[3], was cited before their Lordships. The other is that in spite of the penalty which was imposed was so large a sum as twenty-five lakhs of rupees, counsel did not consider it worthwhile raising the point that it contravened section 167 (8) of the Act.

The last decision cited before us was *Thomas Dana* v. *State of Punjab*[4]. Here too the petitioners were the same individuals as in *Leo Roy Frey* v. *The Superintendent, District Jail, Amritsar*[1]. The question now was whether Article 20 (2) of the Constitution barred the prosecution of the petitioners under the provisions of the Sea Customs Act and the Foreign Exchange Regulation Act a question which had been previously left open but which as the Court observed :

> "In view of the events that have happened since after the passing of the order of this Court, dated October 31, 1957, it has now become necessary to determine."

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1. (1958) M.L.J. (Crl.) 289 : (1958) S.C.J. 301 : 1958 S.C.R. 822.
2. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730.
3. (1957) 2 M.L.J. 41 : (1957) M.L.J. (Crl.) 283 : I.L.R. (1957) Mad. 642.
4. (1959) M.L.J. (Crl.) 474 : (1959) S.C.J 699.

The Court finally held that the proceedings before the Sea Customs Authorities even though they might result in the confiscation of the goods and increased rate of duty or penalty did not consistute "prosecution" within the meaning of Article 20 (2) of the Constitution. Subba Rao, J., dissented and expressed this opinion :—

"I have, therefore, no hesitation to hold that the Customs Officers in so far as they are adjudicating upon the offences mentioned under section 167 of the Act are functioning as judicial tribunals. If the other view, *viz.*, that an authority is not a judicial tribunal, be accepted, it will lead to an anomalous position, which could not have been contemplated by the legislature. To illustrate, a *Customs Collector may impose a penalty of rupees twenty-five lakhs as in this case on his finding that a person has committed an offence under section* 167 (8) *of the Act*, and the accused can be prosecuted again for the same offence before a Magistrate. On the other hand, if the prosecution is first laid before a Magistrate for an offence under section 167 (8) and he is convicted and sentenced to a fine of a few rupees, he cannot be prosecuted and punished again before a Magistrate."

The point here is this : Notwithstanding incidental or passing expressions of opinion that had been made on three earlier occasions, the Supreme Court expressly refrained from saying anything on the matter in *Leo Roy Frey Case*[1] and in *Thomas Dana's Case*[2]. Subba Rao, J., definitely expressed the opinion that a penalty of rupees twenty-five lakhs would be permissible under the statute.

It will be seen that the passages on which learned counsel for the petitioner laid stress do not form the *ratio decidendi* of any of the decisions. Nor do they appear to be even considered expressions of opinion. The same view was taken by a Judge of the Calcutta High Court in *Palkiwala Bros. Ltd.* v. *Collector of Customs*[3]. See paragraph 11 where the learned Judge says :

"But those cases did not, however' in my view go into the question of maximum limit and actually decide the point."

It is occasionally helpful to remind oneself of basic principles and we therefore make no apology for quoting the following passages from Salmond on Jurisprudence. On pages 223 and 224 of the eleventh edition the following passages appear :

"A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi.*' The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. 'The only use of authorities or decided cases', says Sir George Jessel, 'is the establishment of some principle, which the Judge can follow out in deciding the case before him.' 'The only thing', says the same distinguished Judge in another case, "in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided.'......................

The only judicial principles which are authoritative are those which are thus relevant in their subject,-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. These are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of Judges is not to make law by formulating and declaring it—this pertains to the legislature—but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority".

The footnote is also of interest :

"The weight to be given to *obiter dicta* depends upon the circumstances. Sir Carlton Allen's conclusion is that 'if the eminence of the tribunal, the consensus of judicial opinion, and the degree of deliberation all combine to lend a special weight and solemnity to *dicta*, then their authority is for all practical purposes indistinguishable from that of *rationes decidendi*".

In *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*,[4] the following passage appears at page 154 :

"It is of course perfectly familiar doctrine that *obiter dicta* though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context means what the words literally signify—namely, statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision".

We would remark in passing that this passage has been incorporated in Stroud's Judicial Dictionary under the heading *Obiter Dicta*.

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1. (1938) M.L.J. (Crl.) 289: (1958) S.C.J. 801: 1958 S.C.R. 822.
2. (1959) M.L.J. (Crl.) 474: (1959) S.C.J. 699.
3. A.I.R. 1958 Cal. 232.
4. L.R. (1934) 2 K.B.D. 132.

It has been explained that the observations made by the Supreme Court in none of the first three cases which we have cited constitute the reasons for the decision of any of those cases ; nor are they deliberate pronouncements on the matter in question. They are passing observations, incidental and casual in their nature.

The position, therefore, is that the Supreme Court has not given any clear guidance or expressed any considered opinion on the question and the matter remains to be examined more fully.

In order properly to produce the meaning which the learned counsel for the petitioner invited us to put on the words appearing in column 3 against item 8 in section 167 of the Sea Customs Act it is necessary that the words should run as follows ;

" Any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, nor not exceeding one thousand rupees, *which ever is less* ".

But the words " whichever is less ", are not in the statute. A construction which would require fresh words to be introduced into a statute is not to be readily adopted. There are numerous statutes which specify punishments in the alternative for defined offences. Of these statutes the most familiar is the Indian Penal Code. Section 302 of that Code enacts that a person guilty of murder shall be punished with death or imprisonment for life. Section 304 provides that whoever commits culpable homicide shall be punished with transportation for life or imprisonment of either description for a term which may extend to ten years. Section 313, provides that whoever commits the offences defined in section 312 shall be punished with transportation for life or with imprisonment of either description which amounts to ten years. Similarly section 329, Indian Penal Code. Similar alternative provisions are to be found in various other sections of the Code.

Now, this Code has been on the statute-book for close on one hundred years and thousands of cases under these sections must have been dealt with during this period. Yet, so far as we are aware, it has not even been suggested that since the punishment provided in these sections is in the alternative only the lesser penalty can be imposed by the Courts. Imprisonment for life is a less severe form of punishment than death. But, it has not been suggested that because section 302, Indian Penal Code, enacts that a person guilty of murder shall be punished with death or imprisonment for life he cannot be sentenced to death and can be sentenced only to imprisonment for life. Similarly imprisonment for ten years is less severe than transportation for life ; yet it has never been held that where the imposition of these penalties in the alternative is provided for transportation for life cannot be imposed. The long history of the Penal Code is also sufficient to dispose of the further contention that since section 167 of the Sea Customs Act is penal in its nature, Courts must on principle adopt the construction more favourable to the person sought to be proceeded against.

The Penal Code is not the only statute which provides for alternative punishments for the same offence. Another statute which can be called up, from memory, and without research is the Indian Navy (Discipline) Act, 1934. Section 4 of that Act provides that for the offences specified therein the offender may be punished with " death or such other punishment as is hereinafter provided." Section 5 provides that if the offence referred to therein is committed from cowardice the offender shall suffer "death or such other punishment as is hereinafter mentioned." Similar alternative provisions appear in various other sections which follow.

If the contention of learned counsel for the petitioner were right then in every one of these cases only the lesser penalty can be imposed. That surely could not have been the intention of the legislature ; for in that case by prescribing a higher alternative penalty the legislature would be stultifying itself.

There is yet another difficulty in the way of the contentions of the learned counsel for the petitioner. On the basis that Rs. 1,000 is the maximum penalty that

can be imposed on a person concerned in smuggling goods that maximum would be reached in the case of goods of the value of Rs. 333⅓ since three times this figure is Rs. 1,000. So if a person smuggles goods of the value of say three lakhs or even three crores of rupees no penalty can be imposed on him in excess of that which can be imposed upon a person who is concerned in the smuggling of goods of the value of only Rs. 333⅓. Ordinarily in fixing punishments and penalties the legislature attempts to make the penalty appropriate to the offence. The more serious the offence the greater is the penalty provided. The milder the contravention the milder the penalty. An argument which would make serious inroads into so well established and salutary a principle cannot be accepted except where the language of the statute is plain.

At no time have legislatures inclined to be indulgent to smugglers and, the penalties provided in section 167 show that the punishments are intended to be deterrent. Item 4, as it originally stood, provided for the confiscation of the vessel concerned where it "has been within the limits of any port in India, with cargo on board", should it.

> "Be afterwards found in any port, bay, river, creek or arm of the sea in India, light or in ballast and if the Master be unable to give a due account of the cuastoms-port where such vessel lawfully discharged her cargo."

Item 3-A pro-vides that the vessel shall be liable to be confiscated if any part of the cargo of a vessel is thrown over-board or is staved or destroyed so as to prevent its seizure by any officer of customs while the vessel is within Indian Customs waters or while the vessel having been summoned while in Indian waters fails to do so and chase is given.

It is perfectly clear that when the legislature prescribed that the penalty shall not exceed three times the value of the goods it was making a deliberate effort to make the penalty proportionate to the value of the goods involved, to fix the ceiling at Rs. 1,000 would be to defeat this effort of the legislature.

Two other contentions put forward by learned counsel remain to be considered. Section 167 of the Sea Customs Act is based upon section 186 of the Customs Laws Consolidation Act of the British Parliament (Chapter 36, 39, and 40 Vic. 1876) which ends as follows :

> "Every person . . . shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds *at the election* of the Commissioners of Customs".

It was argued that the English Statute expressly conferred the power to choose on the Commissioners and that no corresponding words are to be found in the Indian Statute. The omission, it was said, must have had a purpose and it was further said that that purpose could only have been to make the lesser penalty the maximum penalty.

We are unable to agree. When a statute provides for alternative punishments, a choice between the two punishments must naturally be made. But, we do not suppose that it was ever intended that the choice of the punishment should be left to the person who has been found guilty of having transgressed the law. That option must naturally vest in the person administering the law. That goes without saying.

The freedom of choice would even without the words in question have remained with the Commissioners. The omission of corresponding words in the Indian statute is therefore of no consequence. Besides, though the Indian Act is based on the English Act the drafting is not on parallel lines at all.

Yet another argument was based on section 23 of the Foreign Exchange Regulation Act, 1947. Sub-section (1) of that section was amended in 1957 and then it was provided that a person contravening certain other sections of the Act shall be liable,

> "to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, *whichever is more*".

The argument was that when the legislature thought fit to add the words "whichever is more" in section 23 of the Foreign Exchange Regulation Act, 1947 and omitted to do so in section 167 of the Sea Customs Act one must presume that the intention of the Legislature was that only the lesser penalty should be provided. Now, on this we would make only two observations. One is that the amendment made in section 23 did not consist merely of the addition of the words "whichever is more". The whole of that sub-section was re-written to provide for various other matters also. Besides, however legitimate it may be to interpret the mind of the legislature by looking into the words of a statute it has subsequently enacted, we have not heard that the intention of the legislature as expressed in a particular statute can be gathered by its inactivity in relation to that statute.

It seems to us that the view taken by this Court in *Collector of Customs* v. *Rahiman*[1] and *Venkatanarayana Iyer* v. *Collector of Central Excise, Madras*[2], is right and that view cannot be regarded as having been overruled or disapproved of by the Supreme Court.

In the result, this writ petition fails and is dismissed with costs. Advocate's fee Rs. 250.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Francies Vallabarayar .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (5) (c)—Depreciation in case of property acquired by inheritance.

It is true that section 10 (5) (*c*) of the Income-tax Act, which was introduced by the Amending Act of 1953, provides for arriving at the written down value of assets acquired by an assessee by way of gift or inheritance whereas clauses (*a*) and (*b*) of section 10 (5) of the Act define the written down value with reference to the actual cost to the assessee. But even prior to the introduction of clause (*c*) an assessee would be entitled to depreciation allowance under section 10 (5) of the Act even with reference to property acquired by him by inheritance from his father. The original cost thereof to the assessee in such cases would be the real value of the property at the time the assessee acquired it.

The amendment made in 1953 by introducing clause (*b*) only gives statutory recognition to this principle which should govern the statutory expression 'actual cost to the assessee' in clauses (*a*) and (*b*) of section 10 (5). The limitation introduced by clause (*c*) as to cases where the market value in the hands of the assessee differs from the written down value in the hands of the previous owner would not apply to the earlier assessment years (*i.e.*) earlier to 1953.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R. A. No. 161 of 1955-56 (I.T.A. No. 2655 of 1954-55 Assessment Year 1951-52) ; on its file for decision.

G. Vasantha Pai, for Applicant.

C. S. Rama Rao Sahib, Special counsel for Income-tax and *S. Ranganathan*, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question referred to this Court under section 66 (1) of the Indian Income-tax Act was :

"Whether the assessee is entitled to the depreciation on boats inherited by him from his late father ?"

The Tribunal agreeing with the Departmental Officers, answered that question in the negative on a construction of the statutory expression "actual cost to the

1. (1957) 1 M.L.J. (Crl.) 283 : (1957) 2 M.L.J. 41 : I.L.R. (1957) Mad. 642.

2. (1958) 2 M.L.J. 115.

*Case Referred No. 1 of 1956.

14th April, 1960.
(25th Chaitra, 1882, Saka.)

assessee" in section 10 (5) of the Act. No attempt was made at any stage to verify what the quantum of depreciation allowance should be in case the assessee was entitled to a depreciation allowance despite the fact that the boats in question having been inherited by him, there was no actual expenditure incurred by the assessee himself in acquiring these boats. In section 10 (5), clauses (*a*) and (*b*) define the written down value with reference to the "actual cost to the assessee". It was only subsequent to the assessment year with which we are now concerned, 1951-52, that section 10 (5) (*c*) was inserted by the Amending Act of 1953. Section 10 (5) (*c*) provided for a further definition of the written down value, to mean :

> "In the case of assets acquired by the assessee by way of gift or inheritance, written down value as in the case of the previous owner or the market value thereof, whichever is less".

While we are unable to accept the contention of the learned counsel for the assessee, that the scope of the amendment effected by section 10 (5) (*c*) was wholly explanatory of the law as it stood prior to 1953, we are unable to accept the contention of the learned counsel for the Department, that it was only under section 10 (5) (*c*) any provision was made for granting depreciation allowance for assets which came to the assessee by way of gift or inheritance. We should like to make it clear that we are confining ourselves only to a question of inheritance now. We accept the contention of the learned counsel for the assessee, that the principle laid down by the Rangoon High Court in *In re Commissioner of Income-tax Burma* v. *E. Soloman and Sons*[1], should apply and that the assessee should be declared entitled to the depreciation allowance, the quantum of which is yet to be ascertained, though the allowance is claimed with reference to property, to acquire which the assessee himself did not incur any expenditure because he got it by inheritance from his father. It is true that the statutory expression Page, C.J., had to consider in *In re Commissioner of Income-tax Burma* v. *E. Soloman and Sons*[1], was the original cost thereof to the assessee. That was subsequently amended and the statutory expression that was in force in the year of assessment 1951-52 was "actual cost to the assessee". We do not think there is any real difference between these statutory expressions. Page, C.J., observed :

> " . . . . . whereas in the present case the assessees acquired property otherwise than by purchase, in my opinion the original cost thereof to the assessee means and is the real value of the property at the time when the assessees acquired it . . . ."

We respectfully agree. Besides, that decision held the field without any dissent till section 10 (5) was amended in 1953, when the principle also underlying that decision was given statutory recognition. In our opinion that interpretation should also govern the statutory expression " actual cost to the assessee ". The limitation subsequently imposed by section 10 (5) (*c*), that if the written down value in the hands of the predecessor was different from the market value on the date of inheritance, the lower of the two should prevail, was not applicable to assessments in 1951-52.

The learned counsel for the assessee referred to the observations of Lord Atkin at pages 217-8 in *Corporation of Birmingham* v. *Barnes*[2]. But as pointed out by Page, C.J., in *In re Commissioner of Income-tax Burma* v. *E. Solomon and Sons*[2], the wording in the English Finance Act differs materially, and the question at issue has to be determined really on the language of the Indian Income-tax Act.

We answer the question in the affirmative and in favour of the assessee. That in effect means the Tribunal will yet have to ascertain the quantum which as the Tribunal itself has pointed out, there was no occasion to determine so far.

The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

R.M. ——— *Answer in favour of assessee.*

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1. (1933) I.L.R. 11 Rang. 514.
2. 19 T.C. 195.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Foolchand .. *Petitioner**

v.

Union of India owning the Southern Railway by its General Manager and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 3—Joinder of causes of action—Scope of.

Order 1, rule 3 of the Civil Procedure Code permits joinder of several defendants against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist whether jointly, severally or in the alternative, when if separate suits were brought against such persons, any common question of law or fact would arise. The words used are 'same act or transaction' and not the same cause of action and the provisions of Order 1, rule 3 are wider than the corresponding provisions of section 28 of the Civil Procedure Code of 1882.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court at Madras, dated 14th October, 1959 and made in O.S. No. 426 of 1957.

N. R. Raghavachariar, for Petitioner.

C. Govindaraja Ayyangar, B. T. Seshadri and *J. S. Vedamanikkam*, for Respondents.

The Court delivered the following

JUDGMENT.—This petition seeks to revise the order of Second Assistant Judge of the City Civil Court, Madras in O.S. No. 426 of 1957 directing the petitioner who was the plaintiff in the suit to elect as to against which of the two sets of defendants he would prefer to continue the suit.

The petitioner despatched certain goods to Howrah through the Railway. Respondents 1 to 3 represent the three zones of the Railway through which the goods had to travel. The 4th respondent is an insurance company with whom evidently the petitioner had entered into a contract of insurance. The petitioner claimed that the goods which he sent to Howrah were tampered with during the course of transit, and alleging misconduct on the part of the Railway Servants sued to recover damages. The 4th defendant, the insurer, was also made a party to the suit and a decree was sought against the insurer as well. There was however no complaint on the part of the latter that the precise nature of the cause of action against it had not been disclosed. Mr. Vedamanickam, who appears for the insurance company, made it clear before me that it was never the case of the insurer that there had been any misjoinder of causes of action or that the suit should be dismissed on that account. Such a plea however appears to have been taken by defendants 1 to 3. Issue 1 is :

"Is the suit bad for mis-joinder of parties and causes of action ?"

There is however no indication in the order of the lower Court that it was trying the first issue. The learned Judge only states that there was a preliminary objection on the part of defendants 1 to 3 as to whether there has been a proper joinder of causes of action and defendants in the suit. The contention on the part of the Railway administration was that the claim against the Railway could not properly be joined in the same suit with the claim against the insurance company. The learned Assistant City Civil Judge found that the plaint did not specify how the plaintiff was entitled to a decree against the 4th defendant as well. Instead of directing the plaintiff to clarify the position in regard to the two sets of claims, the learned Judge proceeded to assume what, in his opinion, must have been the basis of the claim and held that in the suit which was laid against both the Railway administration as well as the insurer, the cause of action against the former was the loss of goods in relation to the contract of carriage while the cause of action in respect of

* C.R.P. No. 1740 of 1959. 24th March, 1960. (4th Chaitra 1882, Saka.)

the latter was the contract of insurance. The learned Judge therefore held that the joinder of claims based on those causes of action was improper and that the plaintiff should be called upon to elect as to which of the two sets of defendants he wanted to proceed against.

I find it difficult to follow the line of reasoning adopted by the learned Judge. There is no evidence, in the case, of the terms of the contract of insurance. If the learned Judge really wanted to take up Issue No. 1 and try it as a preliminary issue it was his duty to have allowed the parties an opportunity to adduce evidence that they might have on the point. In that case the plaintiff would have produced the contract of insurance. If it were found after taking such evidence that the claim based on the contract of insurance could not properly be joined with the claim based on the liability of the carrier the 1st issue could be answered in the affirmative. That however was not done in the present case. That issue has in effect been decided without even the plaint specifying the nature of the cause of action against the 4th defendant and without there being any evidence. It is well known that where goods are lost in the course of transit by the Railway, the carrier would be liable only in certain circumstances. The liability of the Railway administration is regulated by the statute and the Risk Note executed by the consignor. A person, who consigns goods by Railway in order to cover the risk in all cases, might insure the goods whereby the insurer would take the liability of the loss, etc., whether the Railway administration could be made liable in such loss or not. Generally in such cases the insurer insists on the consignor proceeding against the carrier first and if the carrier is found liable the insurer is absolved; if the former is held not liable, the latter's liability will arise. In either case the liability arises by reason of the loss of goods in transit. The claims against the Railway and the insurer would thus be in the alternative. The learned Judge has evidently failed to notice that Order 1, rule 3, Civil Procedure Code, permits joinder of several defendants against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise. The words used in Order 1, rule 3, Civil Procedure Code, relate to the same act or transaction and not the same cause of action. The substantial case for the plaintiff before the lower Court was that he lost the goods in transit. The loss would be the act or transaction giving rise to liability of the defendant. Whether the loss took place in circumstances which would render the Railway administration liable or otherwise can only be ascertained at the trial. The common question to be decided in the circumstances of the case is the loss and the right to relief will be in the alternative depending on the finding of the Court. The learned Judge observed that the cause of action in the case of the Railway was the loss and that in the case of the insurer was the contract. This however is not wholly correct. In either case, there was a contract, in the case of Railway the contract of carriage, in the case of the insurer the contract of insurance. The contract alone would not be sufficient to sustain the suit. The principal cause of action is the loss, though the liability of the respective defendants would depend on the reason or the circumstances under which the loss was incurred. It may be that in certain cases both the sets of defendants are jointly and severally liable; certainly they would be liable in the alternative. In *Payne* v. *British Time Recorder Company Ltd.*[1], it was held that as a general rule where claims by or against different parties involved or might involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court would allow the joinder of plaintiffs or defendants subject to its discretion as to how the action should be tried. That decision was rendered under Order 16, rule 4 of the Supreme Court Rules in England. In that case the plaintiff had entered into a contract to supply certain goods with the 1st defendant. In order to carry out that contract he had entered into another contract with the 2nd defendant for supplying him with the goods which he agreed to supply to the 1st defendant. The purchaser refused to

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1. L.R. (1921) 2 K.B. 1.

accept the goods on the ground that they did not conform to the samples. The plaintiff thereupon brought an action against the 1st defendant for price of goods on the ground of non-acceptance. In that action he impleaded the 2nd defendant who had agreed to supply him with goods claiming damages for breach of contract in not supplying the goods in accordance with the samples. It was held that the joinder of two causes of action in the circumstances of the case was proper.

In *Serajul Huqkhan* v. *Abdul Rahaman*[1], a purchaser of property filed a suit to recover possession thereof against a third party. To that suit he impleaded his vendor and made an alternative claim against him for refund of purchase money in case it were to be found that the third party was the owner and the vendor had no title to convey. The Calcutta High Court held that such joinder of causes of action was proper or at any rate desirable. That decision was given under section 28 of the Civil Procedure Code of 1882. Order 1, rule 3 of the Code of Civil Procedure, 1908, which took its place is even wider in that the joinder could be in respect of the same act or transaction and not necessarily within the same 'matter'.

The order of the learned Judge suffers from a more vital infirmity as well. The contract of insurance had not been produced before him and he was not justified without reference to its terms in holding that the joinder of causes of action was improper. The learned Judge himself noticed the fact that the plaint was not specific about the liability of the 4th defendant. If the learned Judge had any doubts that the suit might be bad for multifariousness he should have called upon the plaintiff to particularise his cause of action against the two sets of defendants and proceeded to decide preliminarily issue No. 1. Rules of procedure are intended to aid justice and not as short-cuts for disposal. The lower Court has in an attempt to direct the parties to conform to the rules of procedure has itself ignored them. The order of the lower Court cannot be sustained and is set aside. Respondents 1 to 3 will pay the costs of the petitioner.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

State Electricity Board, by Superintending Engineer, Mettur Dam .. *Petitioner**

v.

K. Govindarajulu and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 36 *and* 149—*Applicability—Statutory body constituted by Government to take over certain functions of Government with independent powers and duties and the right of suing and being sued in own name—Suit by, for act of misfeasance—Period of limitation.*

Article 149 of the Limitation Act applies only to a suit by or on behalf of the Central or State Government. The benefit of the article cannot be availed of or claimed by a grantee from the Government or a statutory body created by the Government to take over certain functions of the Government.

The Madras State Electricity Board constituted under the Madras Electricity (Supply) Act, 1948, is a legal person in the eye of law and a body distinct from and independent of the Government, and shall sue and be sued in its name. The fact that the Government have power to make rules and other controlling powers over the Board would not make the Board a part or limb of the Government for purposes of Article 149 of the Limitation Act.

A suit by the State Electricity Board to recover from the defendant a sum of money being the cost of a pole belonging to it which was broken by the defendant's vehicle and loss of revenue on account of interruption of electric supply to consumers, is governed not by Article 149, but by Article 36 of the Limitation Act.

Corporation of Madras by Commissioner v. *B. D. Kothandapani Chetti*, (1958) 2 M.L.J. 377, applied.

Jagadindranath Roy v. *Hemantha Kumari Debi*, (1904) L.R. 31 I.A. 203 : I.L.R. 32 Cal. 129 (P.C.).

1. (1902) I.L.R. 29 Cal. 257.

*C.R.P. No. 716 of 1959.

18th March, 1960.
(28th Phalguna, 1881—Saka.

Municipal Commissioner for the City of Madras v. *Sarangapani Mudaliar*, (1895) I.L.R. 19 Mad. 154, *Venkatasuryanarayana* v. *Venku Naidu*, A.I.R. 1926 Mad. 1155 and *Bengal North Western Railway Co., Ltd.* v. *Janki Prasad*, A.I.R. 1936 Pat. 362, relied on.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Sankari at Salem, dated 4th December, 1958 and passed in S.C.S. No. 366 of 1958.

T. Venkatadri, for Petitioner.

B. Lakshminarayana Reddy, M/s. Sundararajan and Sivaswami, for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition to revise the decree of the learned District Munsif of Sankari, at Salem, in S.C.S. No. 366 of 1958 dismissing the suit on the ground that it was barred by limitation. The plaintiff which is the State Electricity Board, is the petitioner.

The suit was to recover a certain sum of money being the cost of a pole which had been broken by the 2nd defendant's lorry on 22nd July, 1955 and the loss of revenue to the plaintiff on account of interruption of electric supply to consumers for six hours. The Plaintiff-Board came into existence on and from 1st July, 1957. It instituted the suit on 5th April, 1958. The lower Court dismissed the suit in the view that the suit was governed by Article 36 of the First Schedule to the Limitation Act and should have been filed within two years from the date when misfeasance occurred. This view is supported by the decision in *Corporation of Madras by Commissioner* v. *B.D. Kothandapani Chetti*[1]. It was held in that case that a suit by a municipality for recovery of damages caused to one of its lamp-posts by the defendant's lorry would be governed by Article 36 of Schedule I of the Limitation Act and the suit should be instituted within two years of the misfeasance taking place.

Sri T. Venkatadri, the learned counsel for the petitioner, however, argued that the suit was governed by Article 149 which is applicable to a suit by or on behalf of the Central or State Government. The contention was that the misfeasance occurred at a time when the electricity system was a part of the Government department, that the Electricity Board was but a limb of the Government, and that as Article 149 would undoubtedly have applied to a suit by the Government, the same article should apply to a suit instituted by the Board as well. I think that this contention has no substance. The Electricity Board was constituted under the provisions of the Electricity (Supply) Act, 1948. Section 5 of the Act provided that the State Government should as soon as might be after the issue of the notification under sub-section (4) of section 1, constitute by notification in the Official Gazette a State Electricity Board under such name as might be specified in the notification. The Board so constituted is, as enacted by section 12, a body corporate having perpetual succession and a common seal, with power to acquire and hold property both movable and immovable, and shall sue or be sued in its name. The Plaintiff-Board is thus a legal person in the eye of law and a body distinct from and independent of the Government with powers, rights and obligations provided under the statute. It is no doubt true that under the provisions of the Act, the Government have certain controlling powers over the Board. The Government have also, under section 78, power to make rules to give effect to the provisions of the Act and the Board should, as provided by section 78-A, be guided by such directions on questions of policy as may be given to it by the State Government. The learned counsel contended that in view of the rule-making and controlling powers of the Government, the Board practically functioned under the direction as part of the Government. But mere control exercised by one independent body upon another, however effective, may not by itself be sufficient to regard them but as a single body. The suit in this case was factually one instituted by the Board and can by no means be regarded as one instituted by or on behalf of the Government. In my opinion, therefore, Article 149 of the Limitation Act has no application to the suit.

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1. (1958) 2 M.L.J. 377.

Sri Venkatadri next referred me to section 60 (1) of the Electricity (Supply) Act, 1948, and contended that if the Government had a period of sixty years to sue the 2nd defendant, the Board must be deemed, under this statutory provision, to have the sam period of limitation. Section 60 (1) is as follows :—

"60 (1).—All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board, and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-section (4) of section 1 have been instituted by or against the State Government may be continued or instituted by or against the Board".

The first part of the sub-section provides that the Board shall assume the rights and liabilities of the Government including any contracts entered into by or with them for any of the purposes of the Act. The second part of the sub-section enables both continuation by or against the Board of all suits or legal proceedings originally instituted by or against the Government before the constitution of the Board, and also the institution by or against the Board of suits and proceedings, which but for the constitution of the Board, the Government might have instituted. The learned counsel particularly relied on the second limb of the sub-section and urged that the Board was entitled to have the benefit of Article 149 of the Limitation Act. It appears to me that the sub-section has nothing to do with limitation. The object of the sub-section is merely to enable the Board to continue pending suits and legal proceedings and institute fresh ones. The sub-section does not speak about the period of limitation applicable to institution of suits or proceedings by or against the Board. The provision that suits or proceedings, which might but for the notification under sub-section (4) of section 1, have been instituted by or against the State Government, may be instituted by or against the Board cannot, in my opinion, be read as implying that in such suits or proceedings instituted by or against the Board Article 149 of the Limitation Act should apply.

Sri T. Venkatadri invited my attention to a number of authorities in support of his contention that the Plaintiff-Board should have the benefit of Article 149 of the Limitation Act but I do not think it necessary to refer to any of them as, in my opinion, none of them was in point. On the other hand, I may refer to certain decisions which suggest in principle that the contention of the learned counsel for the petitioner is untenable. In *Venkata Suryanarayana* v. *Venku Naidu*[1], Phillips and Ramesam, JJ., held that where a person had been in adverse possession for 12 years of the lands belonging to Government, and the lands were granted by Government to a third person, the grantee could successfully be met with a plea of adverse possession although it would have been open to Government to resume the lands, 60 years' adverse possession not having been completed against the Government and that whether 12 years' possession as against the grantee was completed before the grant or afterwards was immaterial. In that case the suit was to recover certain lands which were originally service inam lands attached to the office of karnam and were enfranchised by Government. The trial Court had found that item 1 had been held adversely to the defendant from before 1889 and as to item Nos. 1 and 3 that the defendants were holding them adversely for at least 20 years before suit. The enfranchisement was effected by the Government in 1906 and the suit was filed in June, 1918. If the plaintiff got a fresh cause of action from the date of the enfranchisement by the Government, the suit would be in time. The trial Court dismissed the suit in the view that it was barred by time. The point in appeal in that case in this Court reduced itself to the question, when the Crown made a grant at the time when the defendant was already in adverse possession for less than 60 years what adverse possession counted in a suit by a grantee. After referring to a number of earlier authorities the learned Judges reached the conclusion that the suit was barred by time on the view that the grantee from the Crown was not entitled to the benefit of Article 149 of the Limitation Act and that the period of limitation applicable to the suit would be 12 years. Though the decision *Venkata Suyanarayana* v. *Venka Naidu*[1], is not conclusive on the

1. A.I.R. 1926 Mad. 1115.

point I have to decide in this case, it recognised that Article 149 of the Limitation Act was based on public grounds and was specially applicable only to suits by the Crown or the Government and the benefit of the article did not pass to the grantee from the Crown or Government.

In *Bengal North Western Railway Co., Ltd.* v. *Janki Prasad*[1], the decision was that where certain lands belonging to a Railway Company were transferred by the Railway Company to a person for cultivation under a license, a suit by the Railway Company and the Secretary of State, for ejectment of the licensee after the expiry of the license and for rent and mesne profits was governed by Article 149 and not Article 109 or 116 inasmuch as the Railway Company was merely the managing agent on behalf of the Government. It should be observed that the Secretary of State himself was the 2nd plaintiff in the suit to eject the defendants from the lands there in question. Reference may also be made to the *Municipal Commissioner for the City of Madras* v. *Sarangapani Mudaliar*[2], in which this Court held that the period of sixty years could not be taken advantage of by a Muncipality. The Judicial Committee of the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[1], pointed out that the period of 60 years under Article 149 did not avail a grantee from the Crown and therefore the period of limitation was only 12 years. On principle, therefore, when the Board was under the statutory provision given the right to institute a suit which the Government might have but for the notification constituting the Board, such a suit instituted by the Board would be governed not by Article 149 but by the other articles normally applicable to parties other than the Government. In my opinion, the proper article applicable to the suit instituted by the Board is Article 36 of Schedule 1 to the Limitation Act. On that view the suit was rightly dismissed by the lower Court as barred by limitation.

The revision petition fails and is dismissed but with no costs.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN.

N.H.M. Pandian and another .. *Petitioners**

v.

The Board of Revenue (S.E.) by Commissioner for Settlements and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 18 (4)—'*Building*'—*What constitutes—Private market in an estate—Nature of—If a building attracting the provisions of sub-section* (4) *of section* 18.

The right to hold a private market in an estate is not the same as a franchise incidental to the ownership of the estate, and it cannot be said that the right to the market is lost when the right to the estate is lost on its vesting in the Government under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. The expression 'building', in the absence of a statutory definition, has to be construed with reference to the context of the particular enactment. Having regard to the scheme of section 18 of the Act a market consisting of only stalls would also be a building and the fact that the stalls were not all pucca masonry construction will not make any difference. The entire stalls and all the superstructure should be viewed as one unit constituting a building. A private market will not fall within the scope of buildings referred to in sub-section (5) of section 18 and will fall within sub-section (4) of the section. The right to the building secured under sub-section (4) has to be viewed however independently of the rights to use the building in the particular way after the notified date.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings B. P. Rt. No. 828 of 1955, dated 30th April, 1955, of the Board of Revenue,

1. A.I.R. 1936 Pat. 362.
2. (1895) I.L.R. 19 Mad. 154.
3. (1904) L.R. 31 I.A. 203 : I.L.R. 32 Cal. 129.

* W.P. No. 1392 of 1956.

5th April, 1960.
(28th Chaitra, 1882, Saka.)

Madras, vesting the market at Surandai, Tenkasi taluk, Tirunelveli District, in the Government and quash the orders therein.

M. Natesan, for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and *T. Ramakrishnan* for the Additional Government Pleader (*M. M. Ismail*) on behalf of the Respondents.

The Court made the following

ORDER.—This is an application under Article 226 of the Constitution for the issue of a writ of *certorari* to set aside the order of the Board of Revenue, dated 30th April, 1955, negativing the claims of the petitioners, preferred under section 18 (4) of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) (hereinafter referred to as the Act).

The first petitioner was the landholder of the Uthumalai Zamindari, an impartible estate, which vested in the Government with effect from the notified date, 3rd January, 1951, under the provisions of the Act. He was the owner of the private market in Surandai, one of the villages included in the Zamindari estate. On the notified date the second petitioner was in possession of the market as a lessee under the first petitioner.

The market was located in the bazaar, a busy business centre of Surandai, and occupied an extent of about 1.33 acres. The whole area was enclosed by a substantially built masonry compound wall ranging from 7 to 8 ft. in height. Access to that enclosure was regulated by two gates. There were two masonry buildings adjacent to these gates, described as ticket offices, admittedly used for the management of the market. There were two masonry latrines without roofs for the use of those who came to the market. The petitioners claimed that there were 92 stalls in the market prior to 3rd January, 1951. The stalls themselves were not walled enclosures. One set of stalls had roofs of corrugated iron sheets resting on masonry pillars on platforms. The other sets of stalls had only thatched roof, resting on wooden posts. A photograph of the market was before the Board, and it was also produced before me when this petition was heard. In addition there were one or two tea stalls with thatched roofs. There were 22 trees within the enclosure to afford shade to those who used the market.

After the notified date the Estate Manager took the view, that the first petitioner was entitled only to the superstructures and the land on which they stood measuring about 32 cents, and that the rest of the land vested in the Government and was outside the scope of section 18 of the Act. The petitioners applied to the Collector to recover possession of the land, the claim to which was disallowed by the Estate Manager. Eventually, in exercise of the statutory powers under section 18 (6) delegated to it by the Government, the Board decided that the petitioners were not entitled to any portion of the market. The Board held that the private market in Surandai had been part of the impartible estate of Uthumalai, and that the market also vested in the Government along with the rest of the estate. With reference to the superstructures on the land the Board recorded :

> " Of the structures on this land only the two ticket sheds can be regarded as buildings in any reasonable sense of that word. The other structures have either no roof or no walls coming up to the roof and they cannot be said to be buildings within the meaning of section 18 of the Abolition Act. The administration of this market was part of the administration of this estate before the notified date and the two ticket sheds were the offices used for selling tickets to the users of the market and were exclusively used for that purpose. They therefore vest in the Government under section 18 (1) of the Abolition Act from the notified date free of all encumbrance."

The first petitioner purported to assign some sites in the market to others after 3rd January, 1951. These assignees undertook structural alterations of the superstructures on the sites so assigned to them. The Board held that none of the assignees could claim any rights against the Government in whom the whole property had vested on 3rd January, 1951, itself. None of the assignees is a party to those proceedings, and I am not concerned with the rights of any of these assignees *vis-a-vis* the petitioners.

The claim of the petitioners was that the right to the entire market as a building vested in the first petitioner under section 18 (4) of the Act.

The relevant provisions of section 18 of the Act are :

" 18 (1). Every building situated within the limits of an estate, which immediately before the notified date, belonged to any landholder thereof and was then being used by him as an office in connection with its administration and for no other purpose, shall vest in the Government, free of all encumbrances, with effect on and from the notified date. . . . . .

(4) Every building other than a building referred to in sub-sections (1), (2) and (3) shall, with effect on and from the notified date, vest in the person who owned it immediately before that date ; but the Government shall be entitled for each fasli year commencing with the fasli year in which the estate is notified.

(i) in every case, to levy the appropriate assessment thereon ; and

(ii) in the case of a building which vests in a person other than a landholder, also to the payments which such person was liable immediately before the notified date to make to any landholder in respect thereof, whether periodically or not and whether by way of rent or otherwise, in so far as such payments, may accrue due on or after the notified date."

Section 18 (5), which was meant to be explanatory, stated :

" In this section ' building ' includes the site on which it stands and any adjacent premises occupied as appurtenance thereto."

The learned Advocate-General contended that the right which the first petitioner as the landholder had to the property used as a private market should be considered independent of section 18 of the Act. The learned Advocate-General submitted that the right to conduct a private market was analogous to a franchise in English or American Law, and that it was incidental to the ownership of the estate to which the landholder was entitled, and which passed with the estate to the Government under section 3 (*b*) of the Act. The further submission of the learned Advocate-General was that when, on the abolition of the estate, the landholder lost that right, he could not retain any right in the property with reference to which that right was exercised ; the property in this case was the market but it was part of the estate.

Even in *Ramunni Kurup* v. *Panchayat Board, Badagara*[1], to which the learned Advocate-General referred, Venkatarama Ayyar, J., pointed out that the concept of franchise as understood in the English law was never part of the law in India, and the learned Judge emphasised that the right to hold the market has been considered under the Indian law as an incident of the ownership of the land over which the market is held. Earlier in *C. S.S. Motor Service* v. *State of Madras*,[2] Venkatarama Ayyar, J., had occasion to point out that the American concept of franchise was a development peculiar to that jurisprudence, and that has not been adopted in the Indian Constitution.

When the private market was commenced in Surandai is not clear, but it was common ground that it has been in existence from before 1889. Whether the private market was made part of the impartible estate of Uthumalai by any process of incorporation is not clear, I shall, however, assume for the present that there was such incorporation, and that the right to own and conduct a private market was incidental to the ownership of the impartible estate of Uthumalai. Even so, the question that remains to be considered is, whether that private market constitutes a building to which the provisions of section 18 of the Act would apply. It should be remembered that it was only on the application of the provisions of section 18 that the Board decided that the first petitioner was not entitled to any portion of the property which constituted the market. I am not called upon to decide whether, if the first petitioner was entitled to the market as a building under section 18 (4) of the Act, the first petitioner is further entitled to conduct a private market in those buildings. As pointed out in *Ramunni Kurup* v. *Panchayat Board, Badagara*[1], the right to hold a market could be leased or assigned without alienating the land

1. (1954) 2 M.L.J. 101 : I.L.R. (1954) Mad. 513.

2. (1952) 2 M.L.J. 894 at page 900 : I.L.R. (1953) Mad. 304.

itself on which that private market is to be conducted. Thus the right to conduct the private market is one severable from the right to own and possess the site on which that right was exercised. The right to hold a private market is only one of the bundle of rights that flow from the full ownership of the land on which the owner is entitled to conduct the private market. Section 18 of the Act, it should be remembered, is a specific statutory provision creating rights in buildings in an estate which is vested in the Government under section 3 (*b*) of the Act. That the right to hold a market should be viewed as incidental to the ownership of the impartible estate is really no answer to the question, does the property, in which the private market was conducted, constitute a building within the scope of section 18 of the Act? The Board referred to the Kadathur case dealt which by a Division Bench of this Court in its unreported judgment in W.P. No. 381 of 1951. In that case the land-holders claimed a patta for the land on which they had been holding a private market under section 12 of the Act. No question of applying the provisisions of section 18 arose for consideration then. The learned Judges pointed out that the land along with the estate vested in the Government, and the right to hold the private market passed to the Government along with the land, the right to hold the market being one of the incidents of ownership of that piece of land.

The learned Advocate-General contended that the market franchise and the property itself in relation to which that franchise was exercised were annexed to the impartible estate of Uthumalai, and that both fell outside the scope of section 18 and fell only within the scope of section 3 (*b*) of the Act, even if the market contained buildings or the market constituted a building. The further submission was that no portion of the market could be viewed as a buidling within the scope of section 18. With reference to the landholder, the learned Advocate-General submitted, that the scheme of the Act provided for buidlings which the landholder used for his purposes, and buildings which he reserved for the use of the administration of the estate, and the learned Advocate-General contended that the market fulfilled neither of these tests. I am unable to accept this contention. While the purpose for which a given piece of property was used would not conclude the question whether that property constituted a building, the purpose will certainly determine under which of the clauses, clauses (1) to (4), the claim to that building should be considered. If, for example, the landholder had owned a building substantially built in which a a number of shops were permanently located, that would be a building, and the fact that it was not used either for residential or administrative purposes would not make it anytheless a building. I fail to see any difference between such a building and a set of buildings used as a private market.

As I said, I am unable to accept the contention of the learned Advocate-General, that the right to hold a market should be viewed as a franchise incidental to the ownership of the impartible estate, and that when that right was lost, the right to the property in which that right had been exercised was also lost, even if that property constituted a building.

I shall next deal with the question, whether the private market at Surandai was a building within the scope of section 18 of the Act.

What is a building has not been defined by the Act. It shoud be taken as well settled now that the expression building in section 18 includes the land on which the building stands and also the land which could be legitimately viewed as appurtenant thereto. On the question, what constitutes a building, the case-law both Indian and English was elaborately reviewed in *Irani* v. *Chidambaram Chettiar*[1]. As pointed out by Raghava Rao, J., at page 234 :

> " . . . . . . a word like building. . . . . must be understood in differensenses in different statutes and texts according to the purpose and object of the statute and the context."

After pointing out that the word ' building ' is a term of wide significance, the learned Judge said :

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1. (1952) 2 M.L.J. 221.

"In the Concise Oxford Dictionary the word "building" is annotated at page 144 of the Third Edition as equivalent to "house, edifice." And "edifice" is, at page 363 annotated as equivalent to "building" (especially a large one); In Baldwin's Edition (1928) of Bouvier's Law Dictionary at page 141 "building" is annotated as meaning "an edifice erected by art and fixed upon or over the soil composed of stone, brick, marble or wood or other proper substance connected together and designed for use in the position in which it is so fixed." This, it will be seen, is a very comprehensive annotation which does not insist on a roof for the structure or on brick or stone. in its composition."

After stating that 'building' is a more generic word than 'house', the learned Judge proceeded to observe at page 235:

"Building in the etymological sense means 'anything built' and there is no reason why if that is the intendment of the legislature in connection with a particular enactment, compound walls with the space inside may not be regarded as a building."

In view of what has been stated above that the expression 'building', in the absence of a statutory definition, has to be construed with reference to the context of the particular enactment, I do not consider it necessary to embark again upon an examination of the case law considered in *Irani* v. *Chidambaram Chettiar*[1], or upon an examination of the cases referred to at pages 204-205 in Volume III of Halsbury's Laws of England, Second Edition (Hailsham's).

In Volume I of Burrow's Words and Phrases judicially defined, at page 346, is a passage from the judgment of Byles, J., in *Stevans* v. *Gourlay*[2]:

"What is a 'building'? Now, the verb 'to build' is often used in a wider sense than the substantive 'building'. Thus, a ship or a barge-builder is said to build a ship or a barge, a coach-builder to build a carriage; so, birds are said to build nests; but neither of these when constructed can be called a 'building' . . . . . The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word 'building' with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by a 'building' is usually understood a structure of considerable size and intended to be permanent, or at least to endure for a considerable time . . . . It seems to me that the structure in question, which was erected for a shop, and is of considerable dimensions, and intended for the use of human creatures, is clearly a 'building' in the common and ordinary understanding of the word."

Thus what constitutes a building for purposes of section 18 of the Act has to be gathered primarily from the scheme of that Act. Obviously section 18 is not confined to residential buildings as clauses (1) to (3) themselves of section 18 make clear. Even with reference to a residential building, a hut, whether in a rural or urban area, with a thatched roof, would be a building, even if the walls of that hut had not come up to the roof. Clauses (4) and (5) of section 18 secure for the owners rights in a building other than those that fall within the scope of clauses (1) to (3). Clauses (4) and (5), it should be noticed, are not confined to dispossessed landholders but extend to others also who owned buildings in an estate before the notified date. The scheme of the Act was to substitute ryotwari tenure for zamindari tenure for the cultivable lands. Special provision has to be made for land with superstructures thereon in view of the otherwise comprehensive provisions of section 3, vesting everything in the estate in the Government with effect from the notified date. In deciding whethe a superstructure constituted a building, the purpose for which that superstructure was put up would be a relevant consideration, though, as I pointed out earlier, it may not be decisive. The land in this case with the superstructure thereon was used as a market. That the market contained only stalls, and that the stalls themselves were not walled enclosures with substantial roofs, will not make the stalls anytheless buildings. A market consisting only of stalls would be a building. That some of the stalls were in sheds with thatched roofs resting on wooden posts will not make them anytheless buildings. We have the familiar example of sheds being put up with thatched roof as part of school premises, the sheds themselves being used for classes. The Board was of the view, that the stalls with thatched roof were temporary. Apparently what the Board had in view was that these sheds were *katcha* constructions as opposed to *pucca* constructions like the ticket sheds. There were, it should be remembered, stalls with roof of corrugated iron sheets resting on stone pillars. They could not be viewed as tem-

1. (1953) 2 M.L.J. 221. 2. (1859) 7 C.B.N. S. 99 at 112, 113.

porary by any means. Nor, in the circumstances of this case, could the stalls under the thatched roofs be viewed as temporary. Both sets of stalls were there for use, all the time and in that sense they were not temporary. They were not for example temporary in the sense that they were put up for a few days in a year as in a fair or a festival and then dismantled. The stalls were there more or less as a permanent measure. Only they were not all of pucca construction. Where a greater degree of endurability was desired by the owner, as in the case of the ticket sheds, the latrines, and of course the compound wall, he went in for pucca masonry structures. If the fact, that the whole property was intended to be used and was in fact used as a market, i. kept in view, a market situate in the midst of a busy bazaar, it should be clear that the superstructures, within the compound wall constituted buildings, independent of the pucca or katcha nature of the constructions. In my opinion, the whole property should be considered as one unit, and neither each set of stalls, nor each of the stalls in each of the block of buildings, in the market should be viewed as a separate building for the purposes of section 18 (4) of the Act. It is not therefore a case of section 18 (5) of the Act applying at all to decide whether one building was appurtenant to another.

The next question is, whether the market or any portion thereof falls within the scope of section 18 (1), because, if it does, that would exclude the application of section 18 (4). The Board, it should be remembered, held that the two ticket sheds were buildings, and that they fell within the scope of section 18 (1). I have pointed out earlier that all the superstructures standing on the land enclosed by the compound wall should be viewed as one unit, constituting one building though they are in different blocks. Obviously it cannot be said that the whole of it was used for purposes of administration of the estate. No doubt, I have proceeded on the basis that the market belonged to the landholder and was an integral part of the estate. But it does not follow that a building used for conducting a market is a building used solely for the administration of the estate of which the market was a part. No doubt the ticket sheds were used for purposes of administering the affairs of the market. But that again is not enough to show that the ticket sheds were used for the administration of the estate as such. That would be the position, even if the two ticket sheds are viewed as separate buildings. But, as I have already pointed out, all the superstructures whether the constructions were pucca or katcha, should be viewed as a unit constituting a building within the meaning of section 18 (4) of the Act. The private market as such was not a building that fell within the scope of section 18 (1) and no portion of it either fell within the scope of section 18 (1). That the private market as a building belonged to the landholder before the notified date was never in issue. It fell within the ambit of section 18 (4), and it continued to vest in the landholder even after the notified date.

The learned Advocate-General next submitted that, even if section 18 (4) applied, this was not a case for the issue of a writ of *certiorari*, because the decision of the Board should at the worst be viewed as an erroneous decision : it would not constitute an error of law apparent on the face of the record, to justify the issue of a writ of *certiorari*. I am unable to accept this contention. When what is really a building factually and in law is treated as *non est* on what, in my opinion, was an erroneous interpretation of section 18 (4), it is an error of law, and that error is apparent on the face of the record, that is, the order of the Board. Once again I have to emphasise that the right to the building secured by section 18 (4) has to be viewed independent of the use to which that building had been put in the past, that is, it should be viewed independent of the right to conduct a private market in that building on and after the notified date. I have already pointed out that the decision in W.P. No. 381 of 1951 does not apply to the facts of this case. There was no occasion to consider the scope of section 18 in that decision. The learned counsel for the petitioners referred me to the decision of Jaganmohan Reddy, J., in *Chandramani* v. *Collector of Visakapatnam*[1], where the learned Judge upheld the

1. A.I.R. 1957 A.P. 867.

claim of a landholder to a private market under section 18 (4) of the Act. I respectfully agree with the final conclusion reached by the learned Judge in that case. The topographical details of the market which the learned Judge had to consider in that case are very similar to those of the private market in Surandai.

On behalf of the Government it was further submitted that whatever might have been the position on the notified date, there are the rights of the alienees from the first petitioner also to be considered. But that is outside the purview of these proceedings.

The order of the Board will be set aside, and that in effect means the claim of the landholder, the first petitioner, to the market will have to be determined afresh by the Board in the light of the observations in this judgment. If necessity arises to examine again the position of the alienees from the first petitioner, the Board will have to take up that question also.

The rule *nisi* is made absolute, and the petition is allowed. No order as to costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Messrs. S. U. S. Davey Sons, Madras .. *Petitioner**

v.

The Additional Commissioner for Workmen's Compensation, Madras and another .. *Respondents.*

Madras Shops and Establishment Act (XXXVI of 1947), *section* 41 (2)—*Jurisdiction of appellate authority under.*

The jurisdiction of the appellate authority under section 41 (2) of the Madras Shops and Establishments Act is not limited or confined by the express allegations contained in the written application presented to him and merely because the application stated that the employee was dismissed without reasonable cause the appellate authority is not barred from investigating whether the dismissal on the charges of misconduct was justified or not. The appellate authority is entitled to take further evidence himself, and is not confined to the evidence recorded by the management at the enquiry held by them. It is open to the authority to review that evidence and come to his own conclusion even at variance with the conclusion arrived at by the management though the findings recorded by the management cannot be lightly brushed aside.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order in M.S.E. Case No. 130 of 1959 on the file of the Additional Commissioner for Workmen's Compensation, Madras-5 and quash the order, dated 25th August, 1959 and made therein.

M. R. Narayanaswami and *N. Kannan*, for Petitioner.

B. Lakshminarayana Reddy, for 2nd Respondent.

The Court made the following

ORDER.—The Petitioner-firm carried on business as opticians. The second respondent was an employee of the petitioner and was employed as a grinder. The second respondent was charged on 16th February, 1959, with having refused to carry out an item of work assigned to him, which was one of his legitimate duties as a grinder. In response to the notice served upon the second respondent, he furnished his explanation on 17th February, 1959, denying the charges. The Management held an enquiry on 20th February, 1959 and on 21st February, 1959. The Management held that the charges had been proved and terminated the services

* W.P. No. 1042 of 1959. 12th February, 1960. (23rd day of Magha—1881. Saka.)

of the second respondent. Thus, in effect, it was a case of dismissal for misconduct, misconduct established in an enquiry in which the second respondent was given an opportunity to defend himself against the charges.

The second respondent preferred an appeal to the (Additional) Commissioner for Workmen's Compensation, Madras, under section 41 (2) of the Madras Shops and Establishments Act (Madras Act XXXVI of 1947). The Commissioner came to the conclusion that the charges of misconduct had not been proved. He therefore set aside the order of dismissal and directed the reinstatement of the second respondent. That order was dated 25th August, 1959.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order, dated 25th August, 1959.

To appreciate the main contention of the learned counsel for the petitioner, it is desirable to extract the relevant passage from the application preferred by the second respondent to the Commissioner, which was treated as an appeal under section 41 (2) of the Act. In that application the second respondent stated :

> " I served the Management referred to above for 15 years faithfully and honestly. All of a sudden I was terminated from service from 21st February, 1959. Notice was served on 23rd February, 1959, without any reasonable cause."

There was no allegation in that application that the second respondent had been dismissed for misconduct after an enquiry held into the charges framed against him. The second respondent also alleged that he had been victimised but apparently that charge was not persisted in, and nothing turns now upon that allegation made but not proved. As I said, the Commissioner came to the conclusion that the charge of misconduct had not been proved. The learned counsel for the petitioner urged that, where the second respondent himself did not allege in his application or memorandum of appeal that he had been dismissed on the ground of alleged misconduct and that such misconduct has not been proved, the appellate authority had no jurisdiction to go into the questions whether the dismissal was justified or whether the finding of the Management that the misconduct was established was correct. Section 41 (1) of the Act runs :—

> " No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause, and without giving such person at least one month's notice or wages in lieu of such notice
>
> Provided further that such notice shall not be necessary where the services of such a person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose ".

No doubt, section 41 (1) makes a distinction between the termination of services for a reasonable cause, and termination of services on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose. Nonetheless, the position is that termination of services on an established charge of misconduct is also termination of services for a reasonable cause ; only where such termination of services is for established misconduct, the statutory requirement of one month's notice or wages in lieu of such notice is dispensed with. Still the contention of the learned counsel for the petitioner has to be dealt with: when the second respondent chose to claim that his services had been terminated without a reasonable cause, had the Commissioners jurisdiction to decide the real question that arose before him in the appeal, whether the charges of misconduct had been established? No specific form has been prescribed either by section 41 (2) or by any rule to which my attention has been drawn, in which the appeal should be preferred. At the worst, it can be said that the real point at issue was not specifically brought out in the written application that the second respondent preferred to the appellate authority. I am unable to accept as correct the contention, that the jurisdiction of the appellate authority was confined to what was expressly stated in the written application presented to him. The second respondent had a statutory right to prefer an appeal against the order of dismissal. That right he exercised by invoking the appellate authority, and that was by a written application. The ap-

pellate authority has jurisdiction to decide the questions that arose for determination in the appeal. He was not necessarily bound by what was expressly pleaded in the application. It is not the case of the petitioner that he was taken by surprise at what he had to answer in the proceedings before the appellate authority. The appellate authority did go into the question whether the dismissal was justified, that is, whether the charge of misconduct was true; and in the enquiry that preceded the determination by the appellate authority the petitioner had the opportunity of taking part and did take part. I am unable to accept the contention of the learned counsel for the petitioner, that the appellate authority had no jurisdiction to investigate whether the dismissal on the charge of misconduct was justified or not.

The next contention of the learned counsel for the petitioner was that, where an employee was dismissed for misconduct, the scope of the enquiry by the appellate authority should be whether the statutory conditions were complied with or not; the correctness of the findings of the punishing authority, the employer, could not be examined unless there was no evidence to support the finding of misconduct or unless that finding was perverse; the sufficiency of the evidence on which the Management based its finding that misconduct had been established was not a matter for investigation by the appellate authority. It should be remembered that what section 41 (2) confers is an appellate jurisdiction. It is not a revisional jurisdiction. Rule 9 (2) of the Rules framed under the Act provides:

"The procedure to be followed by the Commissioner for Workmen's Compensation when hearing appeals preferred to him under sub-section (2) of section 41 shall be summary. He shall record briefly the evidence adduced before him and then pass orders giving his reasons therefor. The result of the appeal shall be communicated to the parties as soon as possible. . . . ."

Neither section 41 (2), nor rule 9 (2) confines the appellate authority to the evidence already recorded in the enquiry for which section 41 (1) provided. As I said, it was an appellate jurisdiction that was conferred, and the rule made it expressly clear that the appellate authority had jurisdiction to take such further evidence as it considered necessary. It was enough if the enquiry held by the appellate authority was summary. In the face of these provisions I am unable to accept as correct the contention of the learned counsel for the petitioner, that the appellate authority had no jurisdiction to take further evidence. Of course, in exercise of the appellate jurisdiction the appellate authority had also to consider the record of the enquiry conducted by the Management, to verify if the evidence placed on record at that stage was sufficient to support the finding reached by the Management, in this case that the charge of misconduct had been established. It was, however, open to the appellate authority to review that evidence afresh, and also to review that in the light of the further evidence taken in the enquiry before him and come to his own conclusion independent of and even at variance with the finding recorded by the Management. Of course, as the appellate authority it should take into consideration the fact that the Management had jurisdiction to hold an enquiry and to reach its conclusions; and those conclusions of the Management with its right to terminate the services of an employee for misconduct proved to its satisfaction, should be treated with respect by the appellate authority, and should not be lightly brushed aside. But that it is not equivalent to saying that the appellate authority had no jurisdiction to review the evidence afresh.

Whether on the material before the appellate authority, it was justified in reaching the conclusion, that the charge of misconduct had not been proved, is not for me to investigate at this stage and in proceedings under Article 226 of the Constitution. A finding of fact based on the appreciation of the evidence, and to some extent oral evidence, which the Additional Commissioner heard cannot be set aside in these proceedings. It was not a case of no evidence. It was really a case of whom to believe, the second respondent or the partner of the petitioner firm, both of whom gave evidence before the Additional Commissioner. The Additional Commissioner chose to believe the version of the second respondent, that all along after 1955 he had been told that it was enough if he did the work of grinding, without undertaking the other items of work that an employee of the status of a grinder would

be called upon to do. If, as the Additional Commissioner held, the work that was assigned to the second respondent on 16th February, 1959, was not an item of work that he was contractually bound to undertake and discharge, refusal to do that work could not be viewed as misconduct, which was the view taken by the Additional Commissioner. He had jurisdiction to reach that conclusion. I am not to be understood as agreeing with the finding of the Additional Commissioner. I am not called upon to express my agreement with, or dissent from the finding recorded by the Additional Commissioner. As I said, the quantum or sufficiency of the evidence on which the Additional Commissioner reached that conclusion is not a matter for investigation in the exercise of the limited jurisdiction I have under Article 226 of the Constitution.

Thus the position is that neither the assumption of the jurisdiction nor its exercise was vitiated. The petition fails and is dismissed. No order as to costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

South India Metal Works and Rolling Mills, Madras-1 .. *Petitioner**

v.

The State of Madras, by the Deputy Commercial Tax Officer .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 2 (h)—"Sale"—Conversion of scrap metal entrusted to the petitioner into sheets and rings for customers—Whether such entrustment amounted to a purchase by the petitioner and whether the subsequent delivery of sheets and rings to customers amounted to a sale—If so liability to tax.

Where the petitioner-assessee collected scrap from a number of customers and supplied them back exact weight of finished products, the transaction will not amount to a purchase by the petitioner of scrap and then a sale by him, to the customers, of finished products. The petitioner who had never any property in the goods could not transfer a non-existent right to the customer. Hence what the petitioner collected in the transaction was only towards labour charges and the petitioner was not liable to be taxed on the turnover of the finished material treating it as a sale by the petitioner.

Raju Chettiar v. *State of Madras*, (1955) 1 M.L.J. 224, referred to.

In re *Jayaram Chettiar*, (1948) 1 M.L.J. 161: I.L.R. 1949 Mad. 121, distinguished.

Petition under section 12-B (1) of the Madras General Sales Tax Act praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 31st July, 1958 and made in T. A. No. 1166 of 1957, preferred against the Order of the Commercial Tax Officer, North Madras, in Appeal No. 646 of 1956-57.

K. V. Venkatasubramania Iyer and *V. Sethuraman*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Government Pleader (*K. Veeraswami*), for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—One of the lines of business of the petitioner-assessee was to convert the scrap metal entrusted to him into sheets and rings for the customers. In the assessment year 1955-56, the petitioner collected from his customers a sum of Rs. 87,118-14-6 as labour charges for the supply of finished copper and brass-sheets and rings. The Department held in effect that there must have been a purchase of the scrap metal from the customers, and that the subsequent transaction was a sale of the brass and copper sheets and rings. The Department estimated the turnover of the second transaction at three times the labour charges, and, on an estimated turnover of Rs. 2,61,356-11-6, the petitioner was assessed to sales tax. On appeal, the Commercial Tax Officer confirmed that assessment. The Tribunal

* T.C. No. 168 of 1958.
(Revision No. 97 of 1958).

21st December, 1959.
(30th Agrahayana, 1881, Saka).

confirmed that assessment when the assessee appealed to the Tribunal. The assessee thereupon applied to this Court, under section 12-B of the Sales Tax Act to set aside the assessment on this item of his turnover which, it should be remembered, was ultimately sustained by the Tribunal.

At one stage, learned counsel for the petitioner-assessee contended that, if the Department and the Tribunal took the view, that it was in essence a case of barter and applied rule 17 of the Turnover and Assessment Rules, then, the definition of 'sale' in section 2 (*h*), which in effect made a transaction of barter a sale, would be beyond the legislative competence traceable to Entry 54, List 2 of Seventh Schedule to the Constitution. On that, notice was issued to the Advocate-General. It is however, unnecessary to go into the constitutional validity of the definition of 'sale' in the Sales Tax Act, as the petitioner can get the relief he wants in this case on other grounds.

On examining the facts of this case, particularly with reference to a bill which the assessee issued and which is taken as typical of the transactions the assessee entered into with his customers, it is found that there was no question of purchase when the scrap metal was entrusted by the customer to the assessee; nor was there any sale as such of the brass and copper sheets or rings. No doubt, the Tribunal pointed out that "the appellant admitted that it is not possible to correlate any given set of circles supplied to a customer to any particular quantity of scrap received from the customer". That may not be strictly accurate, because, earlier the Tribunal found that the customer got back an exact equivalent in weight of the scrap that had been originally entrusted to the assessee. The nature of the business conducted by the assessee was such that it was not possible to correlate the supply of the new sheets and rings to the very scrap entrusted to the assessee by the customer who got the new sheets and rings in exchange. Apparently, the assessee collected scrap from a number of customers, had all that scrap melted, manufactured sheets and rings, and gave back the customers the exact weight, but in new sheets and rings. That the identity of the new sheets and rings could not be correlated to and established with the scrap supplied by the customer is not really germane in deciding the real question at issue, was there a sale or purchase at any time, either when the assessee took over the scrap for the specific purpose of melting it and converting it into sheets and rings, or when there was a delivery of the finished product, that is, sheets and rings, by the assessee to the customer. The Tribunal found that the total weight of the scrap tallied with the total weight of the sheets and circles given to the customer. As we said, the quantitative tally was there. Only, the identity of the scrap with the new sheets and rings could not be established, and it was not necessary to establish it.

The Tribunal was of the view that the principle laid down by a Division Bench of this Court in *Raju Chettiar* v. *State of Madras*[1], did not apply to the facts of this case, but that the present case came within the scope of the decision in, In re *Jayaram Chettiar*[2]. *Raju Chettiar's case*[1], is certainly authority for the position that, when the assessee received the scrap from the customer for the specific purpose of melting the scrap and converting into new sheets and rings, there was no element of purchase or sale. It was not a case of sale of the scrap by the customer to the assessee, and it was not a case of purchase of that scrap by the assessee. There was therefore no question of any transfer of property in the scrap from the customer to the assessee. If there was no purchase of the scrap by the assessee and no acquisition of property in the scrap metal, it is a little difficult to understand the basis for the view that, when the sheets and rings were made over to the customer, there was a sale involving an element of transfer of property. The assessee who had never any property could not transfer a non-existent right to the customer. The right was that of the customer all along: only, in lieu of the old scrap metal, he received the new metal, that is, purified metal, but cast into sheets and rings. The learned Advocate-General urged that this was the correct view to take of the transactions between the assessee

1. (1955) 1 M.L.J. 224: 6 S.T.C. 131. 2. (1948) 1 M.L.J. 161: I.L.R. (1949) Mad. 121.

and the customer, and we accept that contention as sound, in the circumstances established in this case and on the findings of the Tribunal.

Since there was no element of sale at all when the sheets and rings were handed over to the customer, and what was collected from the customer was in substance and effect the charges for converting the old metal into new sheets and rings, there was no liability to pay any sales tax. Whether, if there was a liability to pay sales tax, the basis of the estimate was correct does not therefore arise for consideration.

We pointed out earlier that the Tribunal was of the view, that the assessee's case fell within the scope of the principle laid down in In re *Jayaram Chettiar*[1]. The facts of that case are easily distinguishable, and it is not therefore necessary for us to go into the question whether the correct principle of law was laid down in that case. There, the learned Judge was apparently satisfied that the course of transactions was that, when a customer purchased the silver article from Jayaram Chettiar, the purchaser paid for the purchase partly in cash and partly in silver. As we said, the facts of that case are easily distinguishable, and the principle laid down in that case cannot be extended to cover the transactions of the assessee.

Since we have come to the conclusion, that there was no sale of sheets and rings to the customer of the assessee, and what the assessee collected was only towards the labour charges, the assessee was not liable to be taxed on the turnover of Rs. 2,61,356-11-6. That turnover shall be excluded from his assessment.

The petition is allowed to the extent indicated above. The petitioner will be entitled to his cos '. Counsel's fee Rs. 100.

K.L.B. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT: MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S. Seethai Achi .. *Petitioner**

v.

Income-tax Officer, Coimbatore .. *Respondent.*

Income-tax Act (XI of 1922), section 34 (1) and section 23-A—Period of limitation of four years—Must be computed with reference to the assessment year of the assessee-shareholder—Section 23-A is only a procedural section

The perioa oi limitation of four years under section 34 (1) (*b*) of the Income-tax Act is to be computed only with reference to the assessment vear of the assessee or shareholder and the date on which an order under section 23-A was passed as against the company would not be relevant in computing the period of limitation either for the assessment or the re-assessment of the shareholder.

Section 23-A is not concerned with any assessment or re-assessment. It is only a procedural section and if an order under section 23-A is passed the question of assessment of the shareholder will have to be taken up. The Department would have no right independent of section 34 to re-assess the assessee under the terms of section 23-A itself.

The service of a valid notice is a condition precedent to the assumption of jurisdiction under section 34 of the Act, and where the notice was served upon the assessee after the period of limitation the Income-tax Officer would have no jurisdiction to reopen the assessment or to re-assess the assessee even though there was a valid order under section 23-A of the Act Since the Department was allowed to complete the assessment during the pendency of the petition under Article 226 of the Constitution a writ of *certiorari* will issue to set aside the notice and the order of assessment on the basis of assessment completed after the issue of the invalid notice.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to call for the records relating to the notice of the Respondent, dated 14th

1. (1948) 1 M.L.J. 161 ; I.L.R. (1949) Mad. 121.

* W.P. No. 886 of 1957. 16th March, 1960. (26th Phalguna, 1881, Saka.)

September, 1957, under section 34 (1) (*b*) (Exhibit A herein) in his proceedings in F. No. 57-S, and after examining the same issue a writ of prohibition restraining the Respondent from taking further proceedings pursuant to the notice or any other appropriate writ or order as the Court may deem fit.

R. Venkatram and *S. Ramamurthi*, for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, assisted by *S. Ranganathan*, for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The petitioner was a shareholder in Somasundaram Mills (P.) Ltd., a company which admittedly fell within the scope of section 23-A of the Indian Income-tax Act.

For the assessment year 1950-51, the previous accounting year for which ended on 1st April, 1950, the assessee was assessed to tax, and that assessment was completed on 31st May, 1953. Subsequently, on 31st March, 1957, an order was passed against Somasundaram Mills, Ltd., under section 23-A of the Act. The date of the general meeting, with reference to which the assessee's divided income must be deemed to have accrued under section 23-A, was 22nd September, 1959, which fell within the year of account, for which the assessee was liable to be assessed in the assessment year 1950-51. After an order had been passed on 31st March, 1957, under section 23-A of the Act, proceedings were taken to re-open the assessment of the assessee for the assessment year 1950-51. A notice was issued by the Income-tax Officer under section 34 (1) (*d*) of the Act, and it was served on the assessee on 14th September, 1957

The assessee applied under Article 226 of the Constitution for the issue of a writ of prohibition, to restrain the Income-tax Officer from proceeding further with any re-assessment under colour of the notice served on the assessee on 14th September, 1957. During the pendency of these proceedings, however, the Department was allowed, without any interim order of stay, to complete the assessment, so that the position now is, that an assessment has been completed under section 34. Though it was a writ of prohibition that was asked for, if it is found that the issue of notice under section 34 (1) (*b*) did not confer any jurisdiction on the Income-tax Officer to re-open the assessment of the assessee, the appropriate remedy would be the issue of a writ of *certiorari* to set aside the notice issued under section 34 (1) (*b*) and the assessment that followed it.

The period of limitation, prescribed for the initiation of the proceedings under section 34 (1) (*b*), is four years. The question is, what is the date, from which that four-year period has to be computed. The contention of the learned counsel for the assessee was that that period should be computed from the expiry of the assessment year in question, 1950-51 and that, therefore, the four-year period came to an end on 31st March, 1955. Therefore, the notice, served on the assessee on 14th September, 1957, was beyond the prescribed period of limitation, and such a notice could not confer any jurisdiction on the Income-tax Officer. That was the contention of the learned counsel for the petitioner. The learned counsel for the Department contended alternatively (1) that the period of limitation should be computed from the close of the assessment year, in which the order under section 23-A was passed, and (2) that no period of limitation was applicable at all, because, independent of section 34, under the very term of section 23-A as it stood in the relevant period, the notional dividend income of the assessee could be taken into consideration in computing the assessable income of the assessee.

In *Spencer* v. *Income-tax Officer*[1], this Court had occasion to go only into the question, what the expression, 'year' in section 34, meant. It was construed as the assessment year, rejecting the contention of the assessee in that case that it was the accounting year. The further question, whether the decision in *Navinchandra Mafatlal* v. *Commissioner of Income-tax*[2], was correct, was left open.

1. (1956) 2 M.L.J. 518 : 31 I.T.R. 107. 2. 27 I.T.R. 245.

In *Navinchandra's case*[1], the Bombay High Court expressed the view, that the period of limitation would have to be computed only after an order under section 23-A was passed. That question , however, was re-considered by the Bombay High Court in *Commissioner of Income-tax* v. *Robert*[2]. Chagla, C.J., explained the scope of his earlier decison in *Navinchandra's case*[1], and he said that the period of limitation to be computed under section 34 (1) was to be computed only with reference to the assessment year of the assessee or shareholder, and that the date, on which an order under section 23-A was passed as against the company, would not be relevant in computing the period of limitation, either for the assessment or for re-assessment of the assessee, that is, the shareholder.

If we may say so with respect we find ourselves in entire agreement with the reasoning and conclusion of Chagla, C.J., in *Commissioner of Income-tax* v. *Robert*[2]. Section 34 (1) refers only to the assessee, and the year with which the assessee is concerned, the assessment year of that assessee. There is no scope for importing into section 34 (1) any further consideration. It should be remembered that a necessity to re-open assessment under section 34 may arise under various circumstances, one of which is an order under section 23-A. Therefore, that the order under section 23-A was passed at a given point of time, may have no relevance in determining the period of limitation permissible and prescribed under section 34 (1) of the Act. If, for instance, discovery or information was beyond four years, that would not extend the period of limitation. Even as a result of discovery, action under section 34 (1) would be permissible only within the period of limitation prescribed thereunder.

Learned counsel for the Department next contended that under the terms of section 23-A, as it stood in the relevant period, re-assessment could be undertaken without recourse to section 34. That contention has been repelled more than once. In *Spencer's case*[3], as well as in other cases, decided under section 23-A, it has been pointed out that section 23-A is not concerned with any assessment or re-assessment. It is only a procedural section, and, if an order under section 23-A is passed, the question of assessment of the shareholder will have to be taken up' either it should be his original assessment, or it should be re-opening of the orignal assessment, if it has been closed under any of the provisions of the Act. In the present case, the assessment was re-opened by recourse to section 34 (1) (*b*) of the Act. Without recourse to section 34, the finality of the assessement of the assessee in this case could not have been avoided. Section 23-A did not provide for it. It should be remembered that, at that stage, the shareholder as such does not come into the picture. He is not entitled to a notice before an order is passed under section 23-A, and he cannot himself challenge the validity of that order by an appeal. It is only the company that is entitled to a notice and to an appeal. Acceptance of the contention of the learned counsel for the Department, that without recourse to section 34 assessment or re-assessment could be effected under the term of section 23-A, would lead to this position, that assessment or re-assessment could be done and completed without any notice to the shareholder. That is wholly opposed to the scheme of the Income-tax Act. At any rate, it is wholly opposed to the scheme of the Income-tax Act, as explained in the decisions of this Court and other Courts. We have no hesitation in rejecting the contention, that the Department had a right independent of section 34 under the term of section 23-A itself, to re-assess the assessee shareholder.

We are not called upon to consider in this case whether, in the circumstances of this case, the assessment could have been re-opened under section 35. It was brought to our notice that action under section 35 was contemplated but was dropped. Therefore, we refrain from saying anything about the applicability of section 35 or about the appropriate period of limitation, had action been taken under section 35 of the Act.

Since the four-year period of limitation for initiating proceedings under section 34 (1) (*b*) ran out on 31st March, 1955 and since the notice under section 34 (1)

1. 27 I.T.R. 245.
2. (1958) 34 I.T.R. 222.
3. (1956) 2 M.L.J. 518 : 31 I.T.R. 107.

(b) was served upon the assessee only after expiry of that period, and further since the service of a valid notice is a condition precedent to the assumption of jurisdiction under section 34 of the Act, we have to hold that the In.ome-tax Officer had no jurisdiction to re-open the assessment or to re-assess the assessee, even though there was a valid order under section 23-A of the Act. Since the notice itself was issued beyond the period of limitation, it has to be set aside by the issue of a writ of *certiorari.* The writ of *certiotari* will also be directed to set aside the order of assessment on the basis of assessment completed after the issue of invalid notice served on the assessee on 14th September, 1957.

The petition is allowed with costs. Though it is the writ of prohibition that has been asked for, it is the writ of *certiorari* that will issue, in accordance with the directions given above. Counsel's fee Rs. 250.

V.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

Lakshmi Ammal and others .. *Appellants**

v.

Ramachandra Reddiar .. *Respondent.*

Hindu Women's Right to Property Act (XVII of 1937), section 3 (2)—Alienation made by a sole surviving coparcener—Right of the widow of a deceased coparcener to interdict alienation without working her rights of partition—Widow—If a coparcener as known under the Hindu Law.

Civil Procedure Code (V of 1908), section 100—Second Appeal—Different inference possible on the evidence—Not a ground of interference with findings of fact.

Though the Hindu Women's Right to Property Act does not make a widow of a deceased coparcener, a coparcener under the Hindu Law, it does confer upon her subject to certain limitations the same interest in the joint family property as her husband had. The mere fact that she has not obtained partition does not mean that her rights are at the mercy of the surviving co-parcener of her husband. The surviving coparcener even if he is a sole surviving coparcener will have no right except for necessity and binding purpose to alienate joint family property, which would destroy the rights of the widow. The widow has a right to impugn and interdict such alienation.

Ramalingam Pillai v. *Ramalakshmi Ammal*, (1957) 2 M.L.J. 382: I.L.R. (1958) Mad. 7, followed.

The term coparcener is based upon the twin principles of a right vested by birth in the male member only and of unobstructed heritage. It is difficult to approximate the position of a widow under the Act to that of a coparcener as understood under the Hindu Law.

The contrary view expressed in *Manorama Bai* v. *Rama Bai*, A.I.R. 1957 Mad. 269, considered.

The jurisdiction of the High Court under section 100 of the Civil Procedure Code does not extend to interfere with the findings of fact merely on the ground that a different inference is possible on the evidence recorded from that drawn by the Courts below.

Appeal under Clause 15 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Krishnaswami Naidu, dated 8th October, 1956 and passed in S.A. No. 1031 of 1954, preferred against the Decree of the District Court of Ramanathapuram at Madurai, in A.S. No. 208 of 1953 (O.S. No. 32 of 1952, Sub-Court, Ramanathapuram, at Madurai).

T. M. Krishnaswami Ayyar and *A. Balasubramanyam*, for Appellants.

R. Gopalaswami Ayyangar, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—This is an appeal against the judgment of Krishnaswami Naidu, J., reversing the judgment and decree of the District Judge of Ramanathapuram in A.S. No. 208 of 1953, which confirmed the judgment and decree of the Subordinate Judge of Ramanathapuram at Madurai in O.S. No. 32 of 1952.

One Krishnaswami Reddiar and Narayana Reddiar were two brothers, who became divided, a division of the family properties having been effected by metes and

* L.P.A. No. 5 of 1957.

16th February, 1960.
(27th Magha, 1881, Saka).

bounds in 1947. Krishnaswami Reddiar died leaving behind his son Ramachandra Reddiar. Narayana Reddiar had two sons Subbiah and Tiruvengadam and one daughter, Lakshmi Ammal. Subbiah died a bachelor in 1948. Thiruvengadam died on 24th October, 1949, leaving behind his widow Alamelu and a daughter, Seethammal. Narayana Reddiar had a sister, also named Lakshmi Ammal. After the death of Subbiah and Thiruvengadam, Narayana Reddiar who survived his sons became ill-disposed towards his daughter-in-law, Alamelu and his grand-daughter Seethammal. It is stated that two or three months after the death of Thiruvengadam, Narayana Reddiar acting on the evil advice of his sister Lakshmi Ammal and his daughter Lakshmi Ammal compelled his daughter-in-law Alamelu and his minor grand-daughter, Seethamal, to leave his protection and care and to seek refuge in the parents' house of Alamelu Ammal. On 16th August, 1950, Narayana Reddiar executed two settlement deeds under the terms of one of which he conveyed and granted a life interest in respect of three items of properties in favour of his sister, Lakshmi Ammal, with an absolute vested remainder in them in favour of Ramachandra Reddiar, his divided brother's son. Under the other settlement deed Narayana Reddiar conveyed and settled some other items of property solely in favour of his daughter, Lakshmi Ammal.

Alamelu, the daughter-in-law of Narayana Reddiar, filed a suit in O.S. No. 64 of 1950, on the file of the Sub-Court, Ramanathapuram, impleading Narayana Reddiar as the 1st defendant and the two Lakshmi Ammals, the sister and daughter of Narayana Reddiar, as defendants 2 and 3 challenging the validity of the two settlement deeds aforesaid. Ramachandra Reddiar who got a vested remainder in respect of some items of properties under one of the settlement deeds was not impleaded as a party in that suit. Pending the suit Narayana Reddiar died. There was a compromise between Alamelu, the plaintiff, in that suit and the two Lakshmi Ammals, defendants 2 and 3, in that suit and by which all the three agreed that the two settlement deeds executed by Narayana Reddiar should be treated as cancelled, and that the properties comprised therein should be taken by them in accordance with the terms of the razinama which were reduced to writing. It is not necessary to set out the terms of the razinama in detail herein.

Ramachandra Reddiar who was not a party to the suit, O.S. No. 64 of 1950, instituted the suit out of which the present appeal arises, O.S. No. 32 of 1952, on the file of the Sub-Court, Ramanathapuram at Madurai, impleading Lakshmi Ammal, the sister of Narayana Reddiar, as the first defendant, Lakshmi Ammal, the daughter of Narayana Reddiar, as the second defendant, Alamelu Ammal, daughter-in-law of Narayana Reddiar, as the third deffendant and minor Seethammal grand-daughter of Narayana Reddiar, as the fourth defendant, for a declaration that he is the sole owner of the properties comprised in the settlement deed, dated 16th August, 1950, marked as Exhibit A-1 subject to the income of the properties being enjoyed by the first defendant, Lakshmi Ammal, during her lifetime. This is one of the two settlement deeds referred to earlier.

This suit was resisted by the defendants who contended that the settlement deed relied upon by the plaintiff for declaration of rights in his favour was sham, not intended to be given effect to and was not in fact given effect to. Defendants 3 and 4 characterised the said transaction as the outcome of Narayana Reddiar's ill-feeling towards the wife of his deceased son Thiruvengadam caused and *engendered* by his daughter and sister. The defendants further contended that in view of the Hindu Women's Rights to Property Act Narayana Reddiar was not competent in law to execute a settlement by way of gift as the properties forming the subject-matter of the settlement were joint family properties in which admittedly the deceased husband of Alamelu Ammal had an undivided interest as a coparcener.

The trial Court found that the settlement deed, Exhibit A-1, was a mere device adopted by Narayana Reddiar to spite and defraud defendants 3 and 4, and that it was not intended to be acted upon and was not in fact acted upon. The trial

Court also took the view that the document, Exhibit A-1, was not valid and binding upon the third defendant, even if it were to be held that the transaction was not nominal or sham. Accordingly the suit was dismissed with costs.

The plaintiff preferred an appeal, A. S. No. 208 of 1953, on the file of the District Judge of Ramanathapuram but was unsuccessful. The learned District Judge concurred with the finding of the trial Court in regard to the nominality of Exhibit A-1 but did not decide the question of the validity of Exhibit A-1 in law as it was not necessary for the disposal of the appeal. According to the learned District Judge once the transaction was found to be nominal, the plaintiff could no longer maintain the suit, and the question of legality of the transaction cannot arise for determination. In the result the learned District Judge dismissed the appeal with costs.

The plaintiff preferred a second appeal, S.A. No. 1031 of 1954 on the file of this Court which was heard and disposed of by Krishnaswami Naidu, J. On the question of the nature of the transaction, Exhibit A-1, whether it was nominal or not, the learned Judge reversed the concurrent findings of the Courts below and recorded the following finding :

> " In any view the finding of the lower Court as regards the nominality of Exhibit A-1 on its not having been acted upon cannot be supported and I am of opinion that the settlement deed was executed and acted upon and the plaintiff's rights under the settlement deed cannot therefore be denied on this ground ".

In view of this finding the learned Judge had necessarily to consider the question of competency of Narayana Reddiar to execute the settlement deed, Exhibit A-1, so as to bind the third defendant. After discussing the question of law the learned Judge held that the third defendant had no right to interdict the alienation made by Narayana Reddiar under Exhibit A-1, though it was a mere settlement or gift, following his observations in the decision *Rathnasabapathi* v. *Saraswathi Ammal*[1]. The learned Judge allowed the Second Appeal, set aside the judgment and decrees of both the Courts below with costs throughout in favour of the successful plaintiff. The learned Judge, however, granted leave to appeal. The aggrieved defendants have preferred the above Letters Patent Appeal.

The question of law that arises for consideration in this Letters Patent Appeal is whether a widow of a deceased coparcener in a Hindu joint family can, without working out her rights of partition under the provisions of the Hindu Women's Right to Property Act of 1937, interdict an alienation made by the surviving coparcener of the family on the ground either that it is a gift and therefore void in law or that it is an alienation not for necessity or binding purpose. There are observations in the decision of a Division Bench in *Rathnasabapathy* v. *Saraswathi Ammal*[1], referred to and relied upon by Krishnaswami Nayudu, J., holding that the widow's rights under the Act did not enable her to challenge alienations made by the surviving coparcener. These observations were really *obiter dicta* and this Court in a subsequent decision reported in *Ramalingam Pillai* v. *Ramalakshmi Ammal*[2], to which one of us was a party disagreed with the said observations and held that the widow under such circumstances was quite competent to question the alienation as otherwise her rights under the Act would be gravely imperilled. It was held in that case that though the Hindu Women's Right to Property Act does not make a widow a coparcener under Hindu Law, it does confer upon her subject to certain limitations the same interest in the joint family property as her husband had. The mere fact that she has not obtained partition does not mean that her rights are at the mercy of the surviving coparceners of her husband. The surviving coparcener will have no right except for necessity and binding purpose to do any act which would destroy the rights of the widow. We are of opinion that the decision in *Ramalingam Pillai* v. *Ramalakshmi Ammal*[2], holds against the rights claimed by the plaintiff in this case, and that on the application of the principle of that decision he should be non-suited.

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1. (1953) 2 M.L.J. 458.
2. (1957) 2 M.L.J. 382 : I.L.R. (1958) Mad. 7.

The learned counsel appearing for the plaintiff-respondent before us contended that Narayana Reddiar was the sole surviving coparcener at the time when he effected the settlement, Exhibit A-1 and that the widow, the third defendant, whatever her statutory rights may be under the Hindu Women's Right to Property Act, was not herself a coparcener and that the Hindu Law does not impose any fetter on the rights of a sole surviving coparcener to deal with the family properties as he likes. The question whether a widow of a deceased coparcener in a Hindu undivided family governed by the Hindu Women's Right to Property Act is a coparcener or not has been considered in several decisions and the preponderating view appears to be that she is not a coparcener in the strict sense in which that expression is undestood under the Hindu Law. Her rights under the Act have been described as follows in the leading decision of this Court in *Subba Rao* v. *Krishna Prasadam*[1].

"To sum up, section 3 (2) of the Act does not operate as severance of interest of the deceased coparcener ; the right which a widow gets under that section is not as heir of her deceased husband ; it is a statutory right based on the recognition of the principle that a widow is the surviving half of her deceased husband ; that the incidents of that right are those specified in the Act ; that such right is one personal to the widow and comes to an end on her death ; that the estate which the widow takes under section 3 (2), does not, on her death, devolve on her husband's heirs ; and that the right of the coparceners to take by survivorship is suspended as against the widow of a deceased coparcener and such right reasserts itself on her death."

A Full Bench of this Court in *Parappa* v. *Nagamma*[2], concurred with the legal position as set out above. At page 255 the Full Bench observes as follows :

"The Act therefore has conferred a new right on the widow of a deceased coparcener in modification of the pre-existing law. Section 3 (2) of the Act does not bring about a severance of interest of the deceased coparcener. Certainly the widow is not raised to the status of a coparcener though, she continues to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she continued the legal *persona* of the husband till partition. From the standpoint of the other male members of the joint family, the right to survivorship was suspended. The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passes away."

A Division Bench of this Court in *Manorama Bai* v. *Rama Bai*[3] (Govinda Menon and Ramaswami, JJ.) has, however, held that the widow under the Hindu Women's Right to Property Act is a coparcener in view of the fact that her rights under the Act are almost equal to that of a coparcener. At page 292, the following observation occurs:

"Therefore there does not seem to be any justification for saying that the widow is not a pucca coparcener and at the best a kacha one not entitled to the rights of survivorship at least (the last male preserve) as a coparcener as she has no right by birth. There seems to be no rational justification for subjecting the widow to the disadvantages of coparcenership without conceding to her the corresponding advantages of that status."

It is not necessary for us to decide the question whether a Hindu widow under the Hindu Women's Right to Property Act has acquired the status of a coparcener under the Hindu Law. Any attempt in search of a legal nomenclature to describe the position and status of a widow governed by the Act may lead to difficulties and anomalies. The term 'coparcener' under the Hindu Law is based upon the twin principles of a right vested by birth in the male issue only and of unobstructed heritage. Mayne in his text-book on Hindu Law, page 333, observes thus :

" . . . . the conception of a Mitakshara coparcenary is a common male ancestor with his lineal descendants in the male line and that the female members of the family who have no vested right by birth and come in only as heirs to obstructed heritage (sapratibanda daya) cannot be coparceners with the male members, though, along with the males, or in exceptional cases by themselves, they are members of the undivided family as a corporate body."

It is difficult to approximate the position of the widow under the Act to that of a coparcener. The rights of the widow are purely statutory and the sum total of her rights is, in the language of the Act the same interest as the deceased husband had.

1. (1953) 2 M.L.J. 561 : I.L.R. (1954) Mad. 257.
2. (1954) 1 M.L.J. 250 : I.L.R. (1954) Mad. 183 (F.B.).
3. A.I.R. 1957 Mad. 269.

The learned Judges who decided *Manorama Bai v. Rama Bai*[1], have tried to evolve something rational out of the Act. But statutes are not always rational and it may not be within the province of the Court to import rationality in an enactment under the guise of interpretation. It is not necessary to invoke the aid of forma legal expression like 'coparcener' to enable the widow to impugn or interdict alienations made by the surviving coparcener of her deceased husband. So long as there is a widow vested with rights under section 3 (2) of the Hindu Women's Right to Property Act, the surviving coparcener, even if he were the sole coparcener, cannot have a free hand in the disposal of the family properties. We are of opinion that even within the strict terms of section 3 (2) of the Hindu Women's Right to Property Act, the interest which a widow has being that of her deceased husband she cannot be a mere passive spectator of the properties being alienated away by the surviving coparcener with the result of nullifying her rights totally and completely. Exhibit A-1 being a gift of joint family properties by Narayana Reddiar was void in law. It follows that the decision of Krishnaswami Nayudu, J., is unsustainable in law and that the judgment and decree of the Courts below must stand.

The finding of Krishnaswami Nayudu, J., holding that Exhibit A-1 is not a nominal transaction but was intended to be given effect to and was given effect to, reversing the concurrent findings of the Courts below is also not legally sustainable. The question is one of fact and the jurisdiction of this Court under section 100, Civil Procedure Code, does not extend to interfere with the findings of fact merely on the ground that a different inference is possible on the evidence recorded from that drawn by the Courts below. We would have had no hesitation in reversing the finding of Krishnaswami Nayudu, J., and upholding the concurrent findings of both the Courts below if it were so necessary. But as already stated, the plaintiff has got to be non-suited on our conclusion on the question of law discussed above.

The Letters Patent Appeal is therefore allowed and the judgment of Krishnaswami Nayudu, J., is set aside. The judgment and decree of the Courts below are restored. The appellant will have his costs throughout.

This case having been set down this day for being mentioned the Court delivered the following Judgment:

Instead of the direction in the Judgment delivered namely that the appellant will have his costs throughout, the following will be substituted :

The appellants will have their costs in the two Courts below. There will be no order as to costs in this Court, either in the Second Appeal or in the Letters Patent Appeal.

V.S. ——— *Letters Patent Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

E. K. Raghavan Reddiar .. *Appellant**

v.

The Collector of Madras .. *Respondent.*

Land Acquisition Act (I of 1894), sections 12 (2) and 18, Proviso (b)—Scope—Award when becomes final —Starting point of limitation for claimant's application asking Collector to make a reference.

The provision for filing of the award in section 12 (1) of the Land Acquisition Act does not have the legal consquence of rendering an award invalid or not final or conclusive against a party. A notice purporting to issue under section 12 (2) is not invalid because there is no evidence that the award has been filed in the Collector's Office before the issue of such notice. Once an award is made under section 11, it is the duty of the Collector to give immediate notice of the award to persons who are not present personally on by representative when the award is made. Once such a notice is issued the period of limitation is six weeks from the date of receipt of such notice.

1. A.I.R. 1957 Mad. 269.

* W.A. No. 170 of 1959.

2nd February, 1960.
(13th Magha, 1881—Saka).

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 31st August, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 618 of 1959, presented under Article 226 of the Constitution of India, to issue a writ of *mandamus* directing the Collector of Madras, the respondent herein, to have the award passed by the Land Acquisition Officer, *viz*., the Personal Assistant to the Collector of Madras being Award No. 6 of 1957, dated 25th March, 1957, referred to the Court under section 18 of the Land Acquisition Act on the matters based on the grounds set out in the petitioner's application, dated 11th May, 1957, for reference addressed to the Collector of Madras.

R. Gopalaswamy Ayyangar and *C. P. Rajagopala Ayyangar*, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Ayyar J., dismissing a petition filed by the appellant under Article 226 of the Constitution for the issue of a writ of *mandamus* directing the Collector of Madras to make a reference to the Court under section 18 of the Land Acquisition Act in the matter of an award passed by him, dated 25th March, 1957. It is common ground that the Land Acquisition Officer who was the Collector made his award under section 11 of the Land Acquisition Act on 25th March, 1957. The appellant was not present at the time when the award was passed either in person or by representative. On the same day the Land Acquisition Officer served a notice on the appellant purporting to be under section 12 (2) of the Act, informing him that an award had been passed in respect of the lands of the appellant. On 11th May, 1957, the appellant intimated to the Collector that he did not accept the award on the ground that the quantum of compensation was inadequate and required him to refer the matter for determination by Court under section 18 of the Act. The Land Acquisition Officer replied that the application for reference was barred by time. The appellant then enquired whether the award had been filed in the Collector's office as required by section 12 (1) of the Act. To this query he received a reply that the petition for reference should have been filed within six weeks from the date of the receipt of notice under section 12 (2) of the Act and the question of filing of the award did not arise. It is on account of the refusal by the Land Acquisition Officer to make the reference that the appellant came up to this Court seeking a writ of *mandamus*. Balakrishna Ayyar, J., who heard the petition dismissed it on the ground that the application for reference made by the appellant was clearly barred by time as it was made more than six weeks after the service of notice under section 12 (2). Hence this appeal.

If we understand the argument of Mr. Gopalaswami Ayyangar, learned counsel for the appellant aright, it was this. Under section 11, after an enquiry the Collector shall make an award. Under section 12 (1) such award shall be filed in the Collector's Office. It is only after it is so filed that it becomes final and conclusive evidence as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. Under section 12 (2) it is only after the Collector has filed his award that he shall give immediate notice of the award to such of the persons interested as are not present personally or by their representatives when the award is made. For the purpose of computing the period of limitaton provided in section 18, Proviso (*b*), it is only after notice under sub-section (2) of section 12 is given after the filing of the award that the application should be filed within six weeks after the receipt of such notice, but if the award has not been filed, time would not begin to run even though a notice purporting to be under section 12 (2) is served on the party. The result would be that the application can be filed within six months from the date of the Collector's award, which, according to learned counsel, means the date of the filing of the award. Ergo if the award has not been filed, no question of limitation would arise at all.

We are unable to accept any part of the above argument of Mr. Gopalaswami Ayyangar. He has cited to us certain decisions, namely, *Secretary of State for India in Council* v. *Bhagwan Prasad*[1], *State of Travancore Cochin* v. *Narayani Amma*[2], and *Padamsi* v. *The Collector of Thana*[3]. In none of these decisions have we been able to find any support for the contention that the validity and finality of an award depends on its being filed. The facts in *Padamsi* v. *The Collector of Thana*[3], were peculiar and as the learned Judge points out, the award which was prepared by the Deputy Collector in that case was in no sense an award within the meaning of section 11 of the Land Acquisition Act as it was only a tentative proposed award for approval by the higher authority. The scheme of the Land Acquisition Act is quite clear. After notice to persons interested under section 9, on a day fixed for any adjourned day the Collector shall proceed to enquire into the objections, if any, which any person interested has stated pursuant to a notice given under section 9 and shall make an award under his hand of the true area of the land, the compensation which in his opinion should be allowed for the land and the apportionment of the compensation among all the persons known or believed to be interested in the land. Under section 12 it is obligatory on the part of the Collector to file the award in the Collector's office. Sub-section (1) declares that except as provided further on in the Act, such award shall be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. Obviously the reference to such award is to the award which has been made under section 11. Under sub-section (2) of section 12 the Collector has to give immediate notice of his award to such of the persons who were interested as are not present personally or by their representatives when the award was made. It is important to notice that the words are not " when the award is filed ". " but when the award is made ". That has reference to section 11 of the Act. Section 16 declares that when the Collector had made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the Crown free from all encumbrances. The mechanical act of keeping the award on the file of the Collector's Office is not what empowers the Collector to take possession of the land. It is the making of the award under section 11 which gives him such power. Whether the award has been filed or not under section 16, once the award is made under section 11, the Collector can take possession of the land and thereupon the land shall vest absolutely in the Crown free from all encumbrances. Section 18 provides for a reference to Court at the instance of an aggrieved claimant, whether the complaint is as regards the measurement of the land, the quantum of compensation or the persons to whom the compensation is payable or the apportionment of the compensation. Any person interested who has not accepted the award may by written application to the Collector require that the matter be referred to the Court. Then occurs a Proviso for the computation of limitation. The Proviso runs thus :

"Provided that every such application shall be made—

(*a*) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award ;

(*b*) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever shall first expire."

Taking clauses (*a*) and (*b*) together, we find two distinct dates for computing the time, namely (1) the date of the Collector's award and (2) the date of the receipt of the notice from the Collector under section 12 (2). So far as the second date is concerned, the period is fixed, namely six weeks from the receipt of such notice

1. (1929) I.L.R. 52 All. 96.
2. A.I.R. 1958 Ker. 272.
3. (1921) I.L.R. 46 Bom. 366.

But as regards the other date, namely, the date of the Collector's award, there are two periods. One is a period of six weeks from that date if the person seeking the reference was present in person or by representative. In other cases the period is six months from the date of the Collector's order. There is a further provision in clause (*b*) of the Proviso that in cases other than those which would fall under clause (*a*) of the Proviso, there would be an alternative period provided but subject to this namely, it is only the shorter period which would be available to the claimant. This obviously would become relevant when notice under section 12 (2) is not given immediately, as the section enjoins on the Collector, but very much later. To give a concrete instance, if the date of the Collector's award is 1st January, 1920, but the notice under section 12 (2) is served on 1st July, 1920, then the period available to the claimant would only be six months from the date of the Collector's award and not six weeks from the receipt of the notice.

In the two cases strongly relied upon by Mr. Gopalaswami Ayyangar there are observations which directly support the view we are taking in this case. In *Secretary of State for India in Council* v. *Bhagwan Prasad*[1], Mukherji, J., on whose judgment learned counsel for the appellant relied observed thus :

> " It will be noticed that under section 18 of the Land Acquisition Act, an application by a person who has not accepted the award to make a reference to the Court must be made within a specified period. This period, in the case of the owners who were not present when the award was made, is " within six weeks of the receipt of the notice. . . . or within six months from the date of the Collector's award, whichever period shall first expire." It is clear that the maximum period allowed for making a petition to the Collector is six months from the 'date of the award.' This maximum period is liable to be cut short, if there is a service of notice by the Collector, concerning the award, on a party interested in making the application. In the case of service, the time allowed is six weeks from the service, provided those six weeks do not go beyond the six months already mentioned, from the date of the award."

In that case there was a notice served by the Collector under section 12 (2) and the claimants applied for a reference within six weeks of the service of notice. But an objection was taken on behalf of the Collector that the petition was barred by time because the application for reference was made beyond the period of six months from the date of the Collector's award. It therefore became necessary for the learned Judges who formed the division bench of the Court to decide as to the date of the Collector's award. Mukerji, J., was inclined to take the view that the expression " date of the award " meant " date of the filing of the award ", whereas the other learned Judge, Niamatullah, J., held that the date of the award is the date when the award is made under section 11 of the Act. In the case before us the application for reference was made beyond the period of six weeks from the service of notice under section 12 (2). On the observations made in the *Allahabad case*[1], the appellant's application would be barred by time. In *State of Travancore-Cochin* v. *Narayani Amma*[2], the facts were similar to the facts in the *Allahabad case*[1]. There too it was observed :

> " Where such notice (notice under section 12 (2)) has been issued, the claimant has six weeks from the receipt of notice under section 12 (2) for the purpose of filing the reference application."

The learned Judges of Kerala High Court followed the view taken by Mukherji, J., that for the purpose of calculating the period of six months provided in the latter part of Proviso (*b*), the date of the award would be the date of its filing in the Collector's Office and not the date on which the Collector had written or signed the award.

In the absence of any binding authority on the point we feel no hesitation in overruling the contention raised on behalf of the appellants. There is nothing in any of the provisions of the Act to warrant us in holding that unless an award is filed in the Collector's Office, it is ineffective and invalid. The provision for filing of the award in section 12 (1) does not have the legal consequence of rendering an award invalid or not final or conclusive against a party. What matters really

1. (1929) I.L.R. 52 All. 96 at 98 and 99.
2. A.I.R. 1958 Ker. 272.

is the making of the award. It is upon such making that the Collector is empowered to take possession of the land and the acquired land vests in the Government. Even for the purpose of calculation of the period of limitation under section 18 we are inclined to take the view that the date of the Collector's award is the date when he makes the award but it is not necessary for us to pronounce on this point as it does not arise in this case. It suffices to say that a notice purporting to issue under section 12 (2) is not invalid because there is no evidence that the award has been filed in the Collector's Office before the issue of such notice. Once an award is made under section 11, it is the duty of the Collector to give immediate notice of the award to persons who are not present personally or by representative when the award is made. Once such a notice is issued, the period of limitation is six weeks from the date of receipt of such notice. In the present case the application was admittedly beyond this period and was rightly rejected. This appeal is dismissed.

K.L.B. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Ranganayaki *alias* Meenakshi Ammal .. *Appellant**

v.

L. Bapu Iyer .. *Respondent.*

Civil Procedure Code (V of 1908), Order 24, rule 3—Applicability—Judgment-debtor who had filed appeal against decree depositing decree amount in Court and obtaining order for furnishing security, by decree-holder before withdrawing the amount—Decree-holder not withdrawing amount owing to inability to furnish security—Interest if ceases to be payable.

Order 24, rule 3 of the Civil Procedure Code, will apply only where the decree-holder is in a position to take out the money deposited by the judgment-debtor in Court, and is not prevented from doing so by any orders passed by the Court, on the invitation of the judgment-debtor. Where the judgment-debtor who had filed an appeal against the decree applied for stay of execution and was directed by the appellate Court to deposit the decree amount in Court and the decree-holder was permitted to withdraw the amount only on furnishing security, but the decree-holder because of the condition requiring her to furnish security was unable to withdraw the whole amount till the appellate Court confirmed the decree, the decree-holder was undoubtedly entitled to interest. To such a situation Order 24, rule 3, will not apply.

Periakaruppan Chettiar v. *Veerappa Chettiar*, (1943) 2 M.L.J. 443, *Mooka Naiker* v. *Venkatasami Naidu*, (1950) 2 M.L.J. 194 and *Piara Mel* v. *Sham Das*, A.I.R. 1936 Lah. 76, relied on.

Appeal against the order of the Court of the Subordinate Judge of Tiruchirappalli, dated 25th January, 1957 and made in E. P. No. 138 of 1956 in O.S. No. 20 of 1948.

P. S. Srisailam, for Appellant.

S. Amudachari and *A. V. Raghavan*, for Respondent.

The Court delivered the following

JUDGMENT.—In O. S. No. 20 of 1948, on the file of the Subordinate Judge of Tiruchirappalli, one Ranganayaki *alias* Meenakshi Ammal obtained a decree on 8th August, 1950, for, among other things, a sum of Rs. 10,500. From the decree, the defendant preferred an appeal, A. S. No. 556 of 1950, on the file of this Court. He also filed a C. M. P. for stay of execution. On 25th September, 1950, the appellate Court directed the judgment-debtor to deposit the money, and the decree-holder was permitted to withdraw it only on furnishing security. The deposit was made on 24th October, 1950. On 22nd July, 1954, the High Court confirmed the decree, in so far as it related to the sum of Rs. 10,500. From time to time the decree-holder withdrew portions of the amount deposited in Court; but because of the condition requiring her to furnish security, she was not able to withdraw the whole amount. She was able to withdraw the balance finally on 30th September, 1954,

* A.A.O. No. 191 of 1957. 4th February, 1960. (15th Magha, 1881—Saka).

that is to say, after the High Court had disposed of the appeal. The decree-holder filed an execution petition, in which she claimed interest on the amount which lay in Court and which she could not draw, owing to her inability to furnish security. The Subordinate Judge disallowed this claim for interest. The decree-holder appeals from that order. The claim for interest is the only point that was pressed before me.

It seems to me that, in this case, the decree-holder was undoubtedly entitled to interest. When a debtor pays his creditor interest naturally ceases to run, because the debt is paid. Interest will also ordinarily cease to run, when the debtor tenders money to his creditor and the creditor improperly refuses to receive it. But, then, before interest can cease to run, the tender which is made, must be an unconditional tender. A creditor is not bound to accept a tender to which conditions or stipulations are attached. When, in the present case, the judgment-debtor put the money into the Court, and, on his invitation, the Court passed an order that the decree-holder should draw it out only on furnishing security he was not making an unconditional tender. He was in effect only making a tender subject to conditions. No creditor is bound to accept a tender to which conditions are attached. Mr. Amudachariar, on the other side, referred me to Order 24, rule 3, which runs as follows :—

> "No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof."

It seems to me that this rule will apply only where the decree-holder is in a position to take out the money, and is not prevented from doing so by any orders passed by the Court, on the invitation of the judgment-debtor. In the present case, the Court passed an order, requiring the decree-holder to furnish security before drawing out the amount, and that condition was imposed on the motion of the judgment-debtor. To such a situation, Order 24, rule 3, will not apply. The decision in *Periakaruppan Chettiar* v. *Veerappa Chettiar*[1], *Mooka Naicker* v. *Venkatasami Naidu*[2] and *Piara Mal* v. *Sham Das*[3], support the view I am taking.

In the result, the appeal is allowed to this extent; the decree-holder will be entitled to interest only up to 22nd July, 1954, when the High Court passed the decree and that too only on that part of the amount which was not withdrawn. There will be no interest on the amounts that were withdrawn. The appellant will be entitled to her costs in this appeal.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

M. V. Perumal Chetty & Company by Partner M. Perumal Chetty and another .. *Petitioners*

v.

The State of Madras by Secretary Home Department, and another .. *Respondents.*

Madras Buildings Lease and Rent Control Act (XXV of 1949), section 13—Exemption under—Validity of order.

It is now well-settled that the grant of exemption under section 13 of the Madras Buildings Lease and Rent Control Act, 1949, is not vitiated merely because it may result in eviction of a tenant on grounds other than those specified in section 7 of the Act. The exemption provision is not a substitute for a relief permissible under the Act itself but is intended to give relief to an owner when he is unable to secure his remedy before the statutory tribunals and the justice of the case requires the grant of such relief.

1. (1943) 2 M.L.J. 443.
2. (1950) 2 M.L.J. 194.
3. A.I.R. 1936 Lah. 76.

* W.P. Nos. 830 and 831 of 1959.

4th May, 1960.
(14th Vaisakha, 1882—Saka).

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to G. O. Ms. No. 2240, Home Department, dated 5th August, 1959, of the Government of Madras and quash the said order.

S. Mohan Kumaramangalam, S. Gopalaratnam, M. R. Narayanaswami and *N. Kannan*, for Petitioners.

The Additional Government Pleader (*M. M. Ismail*), the Advocate-General (*V. K. Thiruvenkatachari*) and *T. K. Sundaram*, for Respondents.

The Court made the following

ORDER.—The petitioners were tenants of different portions of the premises No. 88/89, Godown Street, Madras, let to them for non-residential purposes, and they were in possession when the second respondent purchased the property in January, 1958. Notice of the application of the second respondent to the Government to exempt the building from the operation of the Madras Buildings (Lease and Rent Control) Act (Act XXV of 1949) was given to the petitioners, and their representations were duly considered, before the Government by their order, dated 5th August, 1959, exempted the premises from the provisions of section 7 of the Act. Each of the petitioners applied for the issue of a writ of *certiorari* to set aside the order of the Government.

In paragraph 2 of the impugned order, the Government set out the reasons for granting the exemption sought by the second respondent.

"The Government have carefully examined the request of the landlord in consultation with the Accommodation Controller, Madras. The Government have also carefully gone through the objection statements filed by the tenants—Messrs. Perumal Chetty & Co., and Messrs, Krishnamurthy & Co. The Government find that Messrs. Perumal Chetty & Co., (Petitioners in W.P. No. 830 of 1959) have sublet the premises and that they are making a substantial profit out of this. This subletting also shows that the chief tenant is not solely in occupation of the premises and that he can do with a smaller building. The Government consider that the need of the landlord's son for starting a business of his own is genuine, and consider that the eviction of the tenants from this premises for providing the landlord's son with a premises to carry on his business cannot be termed as unreasonable eviction. The Government therefore consider that premises No. 88/89, Godown Street, G.T., Madras, should be exempted from the provisions of section 7 of the Madras Buildings (Lease and Rent Control) Act, 1949."

Thus the real ground on which the exemption was granted by the Government was that the owner of the premises, the second respondent, wanted to provide business premises for his son Balasubramanian. It was common ground, that that was not one of the grounds within the scope of section 7 of the Act, and that the owner could not have secured eviction of the tenant by recourse to the provisions of the Act.

The main contention of the learned counsel for the petitioners was that, as the Act did not provide for, or even contemplate eviction of a tenant to provide for the needs of any one other than the owner of the building, the exemption granted to the second respondent, to enable him to secure the eviction of the petitioners, would result in an eviction inconsistent with the provisions of the Act, and it would therefore be unreasonable. To provide for unreasonable eviction was to defeat the purposes of the Act and that vitiated the order of the Government, dated 5th August, 1959.

The fallacy that underlies this argument of the petitioner's learned counsel is the assumption, that every eviction of a tenant on grounds other than those specified in section 7 of the Act is unreasonable. As was pointed out in *Globe Theatres Ltd* v. *State of Madras*[1], the result of exemption in any particular case is that the landlord is allowed to enjoy his rights without the restrictions imposed by the Madras Buildings (Lease and Rent Control) Act, thereby relegating the parties to the position under the general law, for example, the Transfer of Property Act. I am not saying

1. (1954) 2 M.L.J. 110 at 118.

that every eviction which is lawful under the general law is also reasonable and nothing that is lawful can be unreasonable. In deciding whether the statutory power vested in the Government by section 13 of the Act was properly exercised, what constitutes a reasonable or unreasonable eviction will have to be decided with reference only to the scheme that underlies the provisions of the Act. The Act itself, it should be remembered, was designed to prevent unreasonable eviction of tenants. Under the Act, when the owner requires the premises for his own use, the eviction he can obtain, subject of course to the provisions of the Act, is both legal and reasonable. If a person so obtains possession, the fact that he shares his house with the members of his family cannot make the eviction that preceded it unreasonable. If an owner wants to provide for any member of his family to whom he is under obligations, legal or moral, to make such a provision, eviction of a tenant, if that is lawful, cannot be viewed as unreasonable. It would not be lawful if the provisions of section 7 of the Act alone were to apply. But if the operation of section 7 is excluded by the exemption granted under section 13, the eviction would be both lawful and reasonable. I am, therefore, unable to accept the contention of the learned counsel for the petitioners, that the exemption granted in this case to the second respondent would result in an unreasonable eviction of the petitioners.

The next contention of the learned counsel for the petitioners, which was based on the observations in *Abdul Subhan Saheb and Sons* v. *State of Madras*[1], was that as exemption was granted to obtain eviction, which would not be permissible under the provisions of the Act, the exemption granted in the present case was vitiated. The scope of the decision in *Abdul Subhan Saheb and Sons* v. *State of Madras*[1], was explained by the same learned Judges in a subsequent decision reported in *Chinniah Servai* v. *State of Madras*[2]. The learned Chief Justice referred to the contention put forward in W.P. No. 2 of 1954: (1959) 2 M.L.J. (N.R.C.) 27.

> "It was contended before the learned Judge that the statutory tribunals had decided against the landlord and the order of the Government was designed to reverse the order of the Tribunals and on the same material placed before the Tribunals,"

and the learned Chief Justice proceeded :

> "He certainly subscribed to the proposition that if the Government exempted the premises from the provisions of the Act on the very same grounds it will in effect amount to a reversal of the appellate authority though in an indirect way and an order passed in such circumstances would be in excess of jurisdiction. It is this latter aspect which compelled this Court to set aside the order of exemption in *Abdul Subhan Sahib* v. *State of Madras*[1] and W.A. No. 44 of 1956."

The learned Chief Justice after a review of the cases reaffirmed the principles laid down in the earlier cases :

> 'Here then was a case the justice o which could not be met by any of the provisions of the Act. Here is an instance of the principle which was laid down in W.A. No. 27 of 1953 as following from the general principles set out in *Globe Theatres Ltd.* v. *State of Madras*[3] namely, that it is only when the provisions of the Rent Control Act did not cover a particular case, that there is legitimate scope for the exercise by the Government of the powers conferred by section 13 of the Act."

The scope of the decision in *Abdul Subhan Saheb* v. *State of Madras*[1], was also examined by Balakrishna Ayyar, J., in W. P. No. 290 of 1957.

It should, therefore, be taken as well settled now that the grant of exemption is not vitiated merely because it may result in eviction on grounds other than those specified in section 7 of the Act. It should be obvious that, if the desired eviction could be secured under the terms of the Act itself, there should be no occasion at all to grant any exemption from the operation of the Act. The exemption is not a substitute for a relief permissible under the Act itself. The relief granted to the owner in this case could not have been secured from the statutory tribunals under the statutory provisions, that is, under section 7 of the Act. The justice of the case required the grant of relief, and that was possible only by exercising the statutory power

1. (1959) 2 M.L.J. 387 at 390.
2. 72 L.W. 782: I.L.R. (1960) Mad. 204.
3. (1954) 2 M.L.J. 110.

to grant the exemption under section 13. The power in this case was exercised on relevant considerations, which were in no way inconsistent with the object of the Act. It was not intended to result in any unreasonable eviction.

The rule *nisi* is discharged in each of the cases and the petitions are dismissed. No order as to costs.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

T. N. Govindarajulu .. *Petitioner**

v.

Lakshmi Ammal by her agent P. V. Narasimhan .. *Respondent.*

Civil Procedure Code (V of 1908), Order 26, rule 1—Petition for examination of witness on commission on grounds of illness—Value, proof and admissibility of medical certificate.

There is nothing in the Evidence Act which makes a doctor's certificate relating to the illness of a person by itself evidence at all. In order to rely on it as evidence it should be proved in the normal way by the testimony of the person giving it. The statement of a doctor in his medical certificate or report is not evidence unless he is called himself as a witness. The fact that such a medical certificate or report was called for by the Court itself does not make any difference to the principle.

(But in the instant case interference in revision was held not warranted as the erroneous decision on a question of law did not involve any question of jurisdiction.)

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Chingleput, dated 27th November, 1959 and made in I.A. No. 246 of 1959 in O.S. No. 71 of 1957.

V. Vedantachari, T. Rangaswami Ayyangar and *A. Venkatesan*, for Petitioner.

R. Gopalaswami Ayyangar, for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition against the order of the learned Subordinate Judge, Chingleput, in I.A. No. 246 of 1959 in O.S. No. 71 of 1957. The defendant is the petitioner.

On the plaintiff's application under Order 26, rule 1 of the Code of Civil Procedure, the lower Court permitted one Panchanatha Mudaliar to be examined as a witness on commission. It is common ground that Panchanatha Mudaliar is a material witness. The witness was sought to be examined on commission on the ground that he was very weak and infirm and confined to bed and that it was physically impossible for him to come to Court or be brought to Court. The affidavit in support of the application was accompanied by a medical certificate, dated 29th July, 1959, granted by Dr. P. T. Srinivasan, Honorary Assistant Surgeon, Government General Hospital, Madras. The certificate stated that Panchanatha Mudaliar was suffering from an attack of acute fever with hyperlipens and palpitation of the heart and that as he was to take complete rest, he was not in a fit condition to travel long distance. The defendant denied that Panchanatha Mudaliar was ill or sick, infirm or weak or confined to bed and opposed the application for examination on commission. After several adjournments of the petition for commission, the learned Subordinate Judge, after hearing the parties, felt that from the affidavit and counter-affidavit he was not in a position to find out the truth or otherwise of the averment as to the physical condition of Panchanatha Mudaliar. He, therefore, directed in his order, dated 3rd September, 1959, that Panchanatha Mudaliar should be examined by the First Physician in the General Hospital and a certificate obtained as to whether the witness was in a position to come and give evidence in Court. On the plaintiff reporting to the lower Court that the doctor

* C.R.P. No. 2105 of 1959. 18th March, 1960.
(28th Phalguna, 1881, Saka).

was not willing to examine the witness unless there was a requisition from the Court, the lower Court issued a requisition through the Dean of the Government General Hospital, Madras, for medical report. Dr. U. Ramachandra, Surgeon (IV District) Madras, sent his medical report, dated 26th October, 1959, in which the doctor said that Panchanatha Mudaliar had been suffering from diarrhoea for the past 10 years, that since six months he had been losing weight considerably, that he looked very pale, weak and emaciated and was not in a fit condition to travel, that his general health was poor and that any exertion might result in strain to the heart. On 27th November, 1959, the learned Subordinate Judge accepted the medical report and finding on that basis that Panchanatha Mudaliar was not in a fit condition to come and give evidence before the Court, ordered that he be examined on commission. In so doing, the learned Subordinate Judge overruled the defendant's objections that the medical report was inadmissible in evidence and that it could not, therefore, furnish the basis of a finding that the witness was ill and infirm and was unable to attend Court.

Sri V. Vedantachari, the learned counsel for the petitioner before me, reiterated the contention based upon the inadmissibility of the medical report and contended that the medical report was no better than a statement not even on oath, of a living person and was worse than hearsay evidence and that the lower Court acted improperly in relying on the medical report and directing the witness to be examined on commission. I think there is force in this contention.

There is nothing in the Evidence Act which makes a doctor's certificate relating to the illness of a witness by itself evidence at all. It is not a sworn statement and if it is to be relied on as evidence, I think it must be proved in the normal way by the testimony of the person giving it who will stand cross-examination. The statement of a doctor in his medical certificate or report, who is not himself called as a witness, is in the nature of hearsay evidence and as such it is not evidence of the truth of what is contained therein.

In *Sris Chandra Nandy* v. *Annapurna*[1], Harries and Sarkar, JJ., held that a medical certificate tendered in support of an application for the issue of a commission for the examination of a writness on the ground of illness was inadmissible in evidence being the worst form of hearsay evidence and that the doctor himself should be called in evidence. Sri R. Gopalaswami Ayyangar, appearing for the respondent, sought to distinguish this case on the ground that there the medical certificate was produced annexed to the affidavit filed in support of the petition for commission evidence, whereas, in the present case, the Court itself called for the medical certificate to enable it to come to a decision on the question whether the witness was ill or infirm and was unable to come to Court. I do not think that circumstance makes any difference to the principle, that evidence in the nature of hearsay is inadmissible. In *Perumal Mudaliar* v. *South Indian Railway Co.*[2], Beasley, C.J., observed that the evidence of experts must be given in the ordinary way and that subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of bloodstains and of the Chemical Examiner, which are made admissible in evidence by themselves—it was obvious that the opinion of an expert must be given orally and that a mere report or certificate by him could not possibly be evidence. In my view the medical report relied on by the learned Subordinate Judge was by itself no evidence of the physical condition of the witness.

But the fact that the learned Subordinate Judge took a wrong view of the non-admissibility of the medical report as evidence by itself will not, in my opinion, be sufficient to enable this Court sitting in revision to interfere with this order. At best it amounted to nothing more than an erroneous decision on a question of law in which no question of jurisdiction was involved. I think it is settled that where a Court has jurisdiction to determine a question and determines that question, it cannot be said that it has acted illegally or with material irregularity because it

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1. A.I.R. 1950 Cal. 173.
2. (1937) 1 M.L.J. 341 : A.I.R. 1937 Mad. 407.

came to an erroenous decision on a question of fact or even of law. It was evidently in that view it was held by Walsh, J., in *Ramalinga* v. *Sankaranarayana*[1], that the High Court could not interfere in revision where an order was passed for commission under Order 26, rule 4 of the Code of Civil Procedure on the ground that the witness was too ill to go to Court, and the order was based on a medical certificate which clearly implied that the witness was suffering from illness and infirmity and was unable to attend Court. It was true in that case the question of admissibility of the medical certificate was not raised but that makes no difference. There was here no error of jurisdiction in the assumption or exercise of it by the lower Court because it decided the question of admissibility erroneously.

The petition fails and is dismissed with costs.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

C. Lakshmi Rajyam .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 6 (iv) and 10—Voluntary payment to an employee under an agreement—Whether amounts to a testimonial gift or a remuneration for past services.

The terms of the document are specific that the payment thereunder was made to the assessee in her character as an employee by way of additional remuneration in respect of her employment as an actress in a film and there could be no doubt that the income thereunder accrued to her by virtue of her having acted in the film. This would preclude the idea of any testimonial gift. The fact that this amount which was paid to the assessee was not allowed as a permissible deduction in the assessment of the donor cannot determine the character of the receipt in the hands of the assessee. The receipt is assessable to tax.

The terms of the document would be decisive of the character of the payment. The meaning of the terms could not be affected or altered by any evidence as to how the wording of the deeds of the covenant came about and any evidence to contradict the plain terms of the deed by attempting to show that the intention of the parties was to give a meaning contrary to the words of the deed is inadmissible.

The question whether the payment to an employee made voluntarily was, by way of testimonial gift or by way of remuneration for past services would depend on the factors whether the payment was altogether unconnected with the service rendered by the assessee and though connected with the service whether it was made merely out of admiration for personal qualities displayed in the course of the employment or it was intended to confer a special benefit with respect to the services rendered so as to increase the earnings in the exercise of the profession.

It will not be correct to say that a payment made after the services had terminated could not be intended as remuneration but could only be by way of testimonial gift. The mere fact that the payment was made by a person other than the employer would not also be decisive of the question whether it was intended as a remuneration or present.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench 'A' under section 66 (1) of the Indian Income-tax Act (XI of 1922), in R.A. Nos. 374 and 375 of 1954-1955 (I.T.A. Nos. 6286 and 6287 of 1953-1954—Assessment Years 1952-1953 and 1953-1954) on its file for decision on the following question of law, *viz.*—

"Whether the sums of Rs. 63,258 and Rs. 10,362 received by the Assessee during the years ended 31st March, 1953, respectively constitute income assessable under the Indian Income-tax Act ?"

K. Srinivasan, for Applicant.

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1. A.I.R. 1929 Mad. 192.

* Case Referred No. 78 of 1955.

21st March, 1960.
(1st Chaitra 1882, Saka).

C. S. Rama Rao Saheb, Special Counsel for Income-tax and *S. Ranganathan* for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The assessee, an actress, was engaged to take the part of heroine in a cinematograph film entitled " Samsaram " produced by a firm of partners, carrying on business in the name of Sadhana Pictures. There was no dispute that the assessee had been paid all that was due to her under the contract of service. The picture, which was released to the public in December, 1950, was a great success. On 5th May, 1951, Ranganatha Das, who had half a share in the Sadhana Pictures executed a document in favour of the assessee, agreeing to pay her a fourth of his share of the realisations from the picture ; the assessee was to have no liability, if it were to turn out that there was a loss in the picture. The agreement to pay a share in the future realisations from the picture was purely a gratuitous and voluntary act on the part of Ranganatha Das. Two months later, he married the assessee. That circumstance, however, is mentioned only to be dismissed as having no bearing on the question of the motive or reason which induced the agreement, whereby the assessee obtained a share in the realisations of the film. The preamble to the document, the relevant portion of which is extracted below, contains a statement of the purpose, for which the gift was made to the assessee.

" Whereas the Party of the second part (assessee) is featured in the chief heroine's role in the picture, and she has acquitted herself in the said role most creditably, and contributed to the unique success of the picture to a very great extent :

And whereas in consideration of the whole-hearted help, co-operation and valuable services rendered by the party of the second part in respect of the production and completion of the picture the Party of the first part (Ranganatha Das) has undertaken to give her from his share of the realisations of the picture a special remuneration in addition to the fixed remuneration paid by the Firm for her services as artist in the picture ".

By virtue of the agreement referred to above, the assessee received two sums of Rs. 63,258 and Rs. 10,362 during the two years of account, corresponding to the assessment years 1952-1953 and 1953-1954 (the assessee's year of account being the financial year). The Income-tax Officer included those amounts in the assessment of the assessee to tax for the respective years : the assessment was upheld on appeal by the Appellate Assistant Commissioner, and also by the Appellate Tribunal. The following question has been referred under section 66 (1) of the Indian Income-tax Act.

" Whether the sums of Rs. 63,258 and Rs. 10,362 received by the assessee during the years ended 31st March, 1952 and 31st March, 1953, respectively, constitute income assessable under the Indian Income-tax Act."

The principal point for consideration is the nature and character of the receipt of the aforesaid sums by the assessee. If it were held that these sums were received by her as remuneration for the services rendered by her in acting for the picture, they would be income, profits or gains of the assessee's profession or vocation, and as such liable to tax.

An emolument, or perquisite of an employee may be paid to him under a contract ; it is also possible to conceive of cases, where there may be customary presents attached to an employment. An employer may also remunerate the services of an employee by a voluntary gift either because there are no emoluments attached to the employment, or because he wants to give him something over and above his contractual remuneration. In all such cases, the amounts received will be the income of the profession or vocation of the employee. It is also possible that an employee may get gift from his master, without it being intended as additional remuneration to the employee, though it might be that what induced the gift was the loyal services of the latter. It cannot be said that, in such case, what was given was remuneration for the service.

Where a payment is not gratuitous, but made under a contract for remunerating the services, there would be no doubtt about the nature of the receipt. But, where

the payment made to an employee was purely voluntary and gratuitous, the question would arise whether it was intended as an addition to his remuneration or whether it was purely a testimonial gift for his past services, that is, a gift of money presented as a mark of esteem or acknowledgment of his services. In the latter case, the amount will not be liable to tax.

The case for the assessee is that the agreement, dated 5th May, 1951, under which Ranganatha Dass agreed to give the assessee 1/4th share of his income from the picture, was wholly unconnected with any idea of remunerating her services, but was made on account of the former's admiration for her personal qualities as an outstanding actress. There can be no doubt that a gift made on personal grounds cannot amount to a payment for services, although the services might have provided a motive or reason for making the gift. Such gifts are considered as testimonial gifts. The distinction between the two types of cases set out above, and the questions to be decided in cases, where a voluntary payment is made to an employee, is pointed out by Rowlatt, J., in *Reed* v. *Seymour*[1]:—

> "Whether it is earned in his office or is in the nature of a donation to him personally, perhaps not unconnected with the circumstance that he has served in the office which—as Lord Justice Younger said in *Cowan* v. *Seymour*[2] is a *sine qua non*—perhaps arising out of the circumstances that he served in that office and people had acquired an admiration for him in respect of that office. *But is it in the nature of a personal gift, or is it remuneration* ? I take it that is the question."

Viscount Cave, in delivering the judgment on appeal, observed (page 646):

> "It must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as testimonial) which is made to him on personal grounds and not by way of payment for his services."

The Appellate Tribunal held that the agreement was clear and unambiguous in regard to the nature of the payment, which they held to be a remuneration for the services rendered by the assessee. Another reason was given in support of the conclusion. The Appellate Tribunal observed that gifts can only be in the form of a capital asset, and never of "various sums of money not quantified and ascertained in the first instance and depending on several extraneous factors and contingencies." The latter reason cannot, however, be supported. We cannot see why a purely personal gift cannot comprise a right to obtain a recurring payment from the collections of a picture.

On behalf of the assessee, it was contended that there was no material from which the Tribunal could say that the agreement was by way of a payment for services, as the services had terminated long before the agreement, and as the assessee had been paid in full her salary. Shortly stated, the learned counsel for the assessee urged three grounds to show why the gift evidenced by the agreement should be treated as a testimonial gift, and not one by way of remuneration for past services. They were : (1) that the gift in the instant case was purely voluntary, there being no obligation on the part of the donor to make any payment, much less a recurring payment; (2) that the services, in recognition of which the gift was made, had long ago ceased and had been paid for, and (3) that the assessee was employed by the partnership: Ranganatha Dass was not by himself the employer or the paymaster, and any payment by him could not partake the character of any remuneration for services.

In *Cowan* v. *Seymour*[2], the assessee was employed as a Secretary and, later on the liquidation of the Company, as the liquidator. The employment in either capacity was without remuneration. On the completion of winding up, a surplus was found after payment to the creditors, etc. The shareholders resolved unanimously to pay one half of the surplus to the assessee. It was held that the payment of that sum to the latter was not in respect of his employment, but more in the nature of a testimonial for what he had done in the past while his office was in existence. In coming to that conclusion, the Court of Appeal laid emphasis on the fact that the office had terminated at the time of decision to make the payment, that such payment was made not by

1. (1927) 11 T.C. 625 at 630. 2. (1919) 7 T.C. 372 at 384.

the employer, that is, the company, but by the shareholders, and on the circumstance that the facts existing in the case pointed to only one conclusion, *viz.*, that the receipt was not a remuneration for the services. In *Reed* v. *Seymour*[1], a benefit match was organised, and the proceeds therein were paid to a professional cricketer in the employment of a club. The distinguishing feature in that case was that certain subscriptions were collected from the public for the benefit of the cricketer, and the benefit match was associated with it. It was held that the subscriptions being spontaneous gifts of the members of the public, would not become income ; likewise the gate collections which might be regarded as contributions of the club to the subscription list. In both the cases, the matter ultimately resolved to a question of fact, *viz.*, whether there was no evidence before the Tribunal of fact, or whether there was evidence on which such Tribunal could come to the conclusion it did.

Great reliance was placed by the learned counsel on the decision in *Bridges* v. *Bearsley*[2]. That was a case where the assessee had served a limited company for a considerable number of years, and was mainly responsible for building up the company. During the lifetime of the principal shareholder, the assessee expected that a substantial number of shares in the company would be transferred to him by the former to give him a status and position in the Company. The principal shareholder did not, however, transfer any shares in his lifetime. It was expected that he would do so at least by his will. Even that did not happen; the principal shareholder had devised his shares in the company in favour of his wife and two sons. The sons, however, felt that they were under a moral obligation to transfer certain shares to the assessee, and in due course they did so. The question arose whether the shares were profits from the assessee's office. It was held by the Court of Appeal that the shares, transferred were not profits acquired by the assessee by way of remuneration for services in his office, but merely a testimonial for what he had done in such office, and that the value of the shares received could not be taxed. Morris, L.J., observed, at page 320 :—

> "It may be difficult to describe in precisely accurate language the features of payments or benefit received which must attract tax and the features of those which will not. The general distinction as outlined by Lord Cave (*Read* v. *Seymour*,[1]) is between payments made by way of remuneration for services and payments made by way of personal gifts. Yet some payments may seem to have a blend of both these elements. The tip given to the taxi driver is in one sense a gift ; a particular tip may be somewhat above what would normally be expected by the taxi driver and may reflect a bountiful impulse. Yet all the tips received including the specially generous one, must be regarded as being by way of remuneration for services. But on the other hand it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the gift is in recognition of services or because the donor agrees to bind himself so as to be compellable at law to make the payment."

The transfer of the shares in that case was effected by a document, which recited that the transferor made the transfer to mark his appreciation of the past services of the employee in the employment of the company, and, in consideration of the employee continuing his present engagement for 4 years from the date of the agreement. It was held that the agreement was not one by way of remuneration for the past services, though the transfer was in appreciation of such services, that it was not also in consideration of his present services, but was merely an implementation of the obligations of the original shareholder actuated by the personal motive of the transferors of doing what they thought that their father might have done under the will, and that it lacked elements of remuneration. The decision ultimately turned on the construction of the document transferring the shares. Dankwerts, J., in the first instance, held that, although the transaction was not for services performed or to be performed, the matter had to be decided on the foot of the recitals as to consideration introduced in the document, and that it was not open to the parties to contend that there was no real consideration. As the document specifically stated that the transfer was in consideration of the assessee continuing his services to the company for 4 years, the learned Judge held that it was for services to be rendered. This view was not accepted in the Court of Appeal. The Court of Appeal held that the covenants were in effect a mere recital of the appreciation of the assessee's services, and that it was not possible to

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1. (1927) 11 T.C. 625 at 646. 2. (1959) 37 T.C. 289.

construe the transfer of the shares as anything but a present or testimonial gift in favour of the transferee.

In the instant case, the purpose for which the gift was made is expressly stated in the document to be one as additional remuneration for the services rendered by the assessee. The learned advocate for the assessee contended that, notwithstanding the terms of the document, the other circumstances in the case would show that there could be no intention on the part of the donor to remunerate the assessee for any service, as the dominant object could only be to make a gift out of admiration for her proficiency in acting. We shall consider those circumstances seriatim.

The first of them was that, at the time the agreement was made, the assessee had ceased to do any services as an actress, and that she, having already been paid for such services, the payment was voluntary. A payment voluntarily made could still be done by way of remuneration for services. In *Herbert* v. *McQuade*[1], Collins, M.R., observed :—

"Now that, whether the particular facts justified it or not, is certainly an affirmation of a principle in law, that a payment may be liable to income-tax although it is voluntary on the part of the person who makes it, and that the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office : if it does, it does not matter whether it was voluntary or whether it was compoulsory on the part of the persons who paid it. That seems to me to be the test ; and if we once get to this—that it has come to him by virtue of his office, accrued to him in virtue of his office—it seems to me that it is not negatived, that it is not impossible merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money, to pay it."

In *Wright* v. *Boyce*[2], voluntary gifts were made to a huntsman at Christmas time, in accordance with a widespread custom. It was held that the payment received by the huntsman should *prima facie* be taken as made in pursuance of the custom, of which the huntsman as such by virtue of his office or employment was the object, and to have been received by him in that capacity and, therefore, liable to tax.

Nor will it be correct to say that a payment made after the services had terminated could not be one intended as remuneration, but could only be by way of testimonial. That was also the view adopted by this Court in *Sadasivam* v. *Commissioner of Income-tax*[3] where certain payments for past services were held to be of revenue nature.

It was then contended that the gift made by Ranganatha Das who was not an employer, the employer being the partnership firm, would be more analogous to the case of an admirer making a present under an impulse of the moment by way of appreciation. The asssumption that the donor was not the employer is not wholly correct ; he was a partner in the Sadhana Pictures, and he would be as much an employer as the other partner. But it is not necessary to reject the contention on that ground: even assuming that to be corect, it appears to be fairly well settled that the mere fact that a gift or payment was made by a person other than an employer, will not be decisive of the question, whether it was intended as a remuneration or present. In *Bridges* v. *Bearsley*[4], Danckwerts, J., observed, at page 302 :

" Nor again can it be assumed that the fact that the money or property is acquired from other persons than the recipient's employers, prevents the acquisition being treated as a profit of the recipient's office ".

Similar observations were made by Jenkins, L.J., at page 312, after referring to the decision in *Cowan* v. *Seymour*[5]:

" A benefit provided for the holder of an office or employment under a company may be a profit of that office or employment although provided by shareholders and not by the Company itself, the " natural paymaster "."

In *David Mitchell* v. *Commissioner of Income-tax*[6], the assessee was an accountant, who was also a partner in a firm of chartered accountants. On behalf of the latter, he assisted in the flotation of the company. In recognition of his services, the company made

1. (1902) 4 T.C. 489 at 500.
2. (1958) 36 I.T.R. 504.
3. (1955) 28 I.T.R.435.
4. (1957) 37 T.C. 289.
5. (1919) 7 T.C. 372.
6. (1956) 30 I.T.R. 701.

an unsolicited gift of a number of shares in the company to the assessee. It was held that the shares were received by the assessee in appreciation of the professional services rendered by him, and in order to give him an extra profit over and above the share of the profit he might get from the firm, of which he was a member, and that, therefore. they were liable to tax. The learned Judges, following the decision in *Cooper* v. *Blakiston*[1], held that where a sum of money was given to an employee substantially in respect of his services as employee, it should be held to accrue to him by reason of his office. The learned Judges observed at page 716 :—

"The test, therefore, confining ourselves to the present case, would be this : first, was the payment altogether unconnected with the service rendered by the assessee to the promoters in connection with the flotation of their Company ? The answer to that primary question has been furnished by the assessee himself. It was not unconnected. Next, though connected with the assistance he had rendered in connection with the flotation of the company as a member of his firm, was it made to him merely out of admiration for his personal qualities displayed in the course of the carrying out of the engagement or was it intended to confer a special benefit on him with respect to the services rendered so as to increase his earnings in the exercise of his profession ? "

There is no doubt in the present case that the first of the two tests has been satisfied. On the question whether the second has also been satisfied, the learned counsel for the assessee relied on the decision in *Reed* v. *Seymour*[2], and contended that the payment in the present case was the outcome of a spontaneous admiration rather than of a calculated act to pay for the services of an artist who had already been paid in full her remuneration by the Sadhana Pictures. In *Reed* v. *Seymour*[2], a cricket club organised a benefit match to a cricketer in their service. The proceeds of the match were ultimately received by the cricketer. It was held that the receipt could not be held to be a profit accruing to him in respect of the cricketer's office of employment, but was in the nature of a personal gift, not assessable to tax. The House of Lords held that the quality of payment was that of a spontaneous gift made by the members of the club on the eve of his retirement, and was not a perquisite to his office. In *Moorhouse* v. *Dooland*[3], a similar payment was made to a cricketer by the Cricket Club organising a cricket match. The cricketer who was assessed on the amount received, was a professional cricketer employed by the club. The term of his employment which was in writing contained a clause which stated " collections shall be made for any meritorious performance by the professional ". It was held that the collctions were part of the earnings of the respondent's employment, and not mere personal presents distinct from his earnings. The principles which are deducible from the earlier cases have been succinctly stated by Jenkins, L.J., at page 22 in *Moorhouse* v. *Dooland*[3], thus :—

" (1) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words, by way of remuneration for his service. (ii) If the recipient's contract of employment entitled him to receive the voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that from the standpoint of the recipient it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services. (iii) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent ground for the same conclusion. (iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as for example a collection made for the particular individual who is at the time vicar of a given partish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example."

In *Mahesh Anantrai Pattani* v. *Commissioner of Income-tax*[4], the assessee served a Maharaja as a Diwan. Rs. 5,00,000 were paid over to the assessee, through the Maharaja's Bank, the Maharaja indicating in his letter that the money was paid to the assessee as a gift in consideration of the assessee having rendered loyal and meritorious service. About three years later, the Maharaja confirmed that he had given the assessee the sum of Rs. 5,00,000 as a token of his affection. The Bombay High

1. (1909) 5 T.C. 343.
2. (1927) 11 T.C. 625.
3. (1954) 36 T.C. 1.
4. (1958) 35 I.T.R. 734.

Court held that the payment was liable to tax. It was held that the dominant intention of the Maharaja was to remunerate the assessee for his services.

It has, therefore, to be seen whether, from the point of view of the assessee, the amount received accrued to him by virtue of his employment. That is a matter of evidence. The circumstances relied on by the assessee will, no doubt, be evidence for deciding the character of the receipt, but such evidence will be of very little value, when reasons for the payment are contained in a document between the parties—a document which has not been shown to be sham or one brought about with any ulterior purpose in view. The terms of the document then would be evidence on the question. In *Bridges* v. *Bearsley*[1], it was held that the terms of the document would be decisive of the question, and that the meaning of the terms thereof could not be affected or altered by any evidence as to how the wording of the deeds of covenant came about, and that the evidence to contradict the plain terms of the deeds by attempting to show that the intention of the parties were to give a meaning to the provisions of the deeds contrary to the words which the deeds plainly contain, was inadmissible. In the present case, the terms of the arrangement are specific that the payment thereunder was made to the assessee in her character as an employee by way of additional remuneration in respect of her employment, and there could be no doubt that the income thereunder accrued to her by virtue of her having acted in the film. That would preclude the idea of any testimonial gift, as in the words of the Master of the Rolls in *Moorhouse* v. v. *Dooland*[2] as to the alternatives between a case of remuneration and personal gift,

> " I observe only the alternatives were intended to be mutually exclusive—if the sum in question was a mere personal gift then *ex necessitate rei* it was not received by way of earnings of the office or employment ; and *vice versa* ".

The learned counsel for the assessee contended that, in the assessement to income-tax, Ranganatha Dass claimed deduction of the amounts paid, under the agreement, to the assessee. But the Department declined to allow the deduction claimed. From that, it was sought to be argued that it was not a remuneration paid to the assessee. We cannot see how that can follow. The fact that the amount paid to the assessee was not allowed as a permissible deduction in the assessment proceedings of Ranganatha Dass, cannot determine the character of the receipt in the hands of the assessee.

The circumstances relied on by the assessee to support a case of personal gift are not conclusive while the alternative case is made out by the terms of the document. The Appellate Tribunal had, therefore, sufficient material to come to the conclusion it did, namely, that the receipts were assessable. We answer the question referred to us in the affirmative and against the assessee. The assessee will pay the costs of the Department. Advocate's fee Rs. 250.

V.S. — *Reference answered against the Assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Associated Oil Mills Ltd., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 4 (3) (vii), 6 (v) and 10—Requisitioning business premises by Government—Payment of compensation to the assessee—Capital receipt or revenue receipt—If exempt from tax on the basis of casual and non-recurring nature.

A mere prevention of a part of a business cannot for that reason alone be held to be a destruction of the profit earning apparatus of the assessee. If there is a cancellation of trading contract any compensation received therefor would be trading receipt. Even if the cancellation is that of any agency contract the compensation paid would be a capital or revenue receipt according as the business terminated was itself the structure of the assessee's business or one which was entered into in the ordinary course of trade.

1. (1957) 37 T.C. 289.
2. (1954) 36 T.C. 1 at 16.

* C.R. No. 32 of 1955.

8th March, 1960.
(18th Phalguna 1881, Saka.)

The property or building in which a manufacturer carries on his business would no doubt be part of the assets of his business. By reason of the requisition by the Government the machinery of the business of the assessee was not interfered with. The mere fact that an intended business premises were requisitioned by the Government cannot amount to sterilization of a part of the business; unless it be that but for the premises no business could be conducted. The order of the Government did not prevent the assessee from doing the business at other places. It cannot be held that the structure of the business was as such affected. The mere temporary user of the building belonging to the assessee's business without more or an interruption to the user thereof could not be held to be an injury of an enduring nature to amount to a sterilization of the asset. Only the assessee was unable to realize the expected profit. The compensation awarded to the assessee cannot therefore be held to be a capital receipt.

An operation which produces income would be taxable whether it was received in the course of the normal trading activity or by reason of a compulsory acquisition and what is received as a compensation for the loss of income of a trade or for an injury caused by reason of an interruption to a trade could be a revenue receipt.

There was no interruption to the business of the assessee and the capital asset existed intact and the assessee only lost the opportunity of earning profits at one place. It may be that the receipts could be correlated to the ownership of the business which had to be transferred to another place but it cannot for that reason be said to arise out of the conduct of the business.

The compensation paid was not for sterilization of the business of the assessee. Nor was it income from business though the amount was based on the foot of income received from his business at the other place. The receipt should be held to fall under section 6 (*v*), *i.e.*, income from other sources. The receipt being of a casual, non-recurring nature would be exempt from tax under section 4 (3) (vii) of the Act.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench 'A' under section 66 (1) of the Indian Income-tax Act (XI of 1922) in R.A. No. 545 of 1954-55 (I.T.A. No. 149 of 1953-54 Assessment year 1949-50) on its file for decision on the following question of law, *viz.*,

" Whether on the facts and in the circumstances of the case the sum of Rupees 63,259 received by the assessee from the Government is income and can be brought to tax under any of the provisions of the Indian Income-tax Act."

T. V. Viswanatha Ayyar, T. T. Srinivasan and *A. N. Rangaswami*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The following question has been referred under section 66 (1) of the Indian Income-tax Act:—

" Whether on the facts and in the circumstances of the case the sum of Rs. 63,259 received by the assessee from the Government is income and can be brought to tax under any of the provisions of the Indian Income-tax Act."

The assessee is a private limited company, which commenced business at Madras in 1941 in the purchase and sale of groundnuts, kernel, oil and cake, etc. Thereafter, it acquired R.S. No. 458/1, measuring 4 acres, 15 cents in Ammanur village, Arkonam, for the purpose of erecting an oil-mill. In course of time, a building was put up for housing the machinery for the manufacture of oil. The property was, however, requisitioned by the Collector of Chingleput by an Order dated 20th May, 1942, for the use of the military personnel; possession was taken by the Government three days later. The assessee, who normally would have commenced working of the mill had not the requisition order intervened removed the machinery to Katpadi, where another building was put up and the factory established. The assessee began to work the new mill from the last week of October, 1942. The building and the rest of the property at Arkonam were duly derequisitioned by the authorities and possession was given back towards the end of January, 1945. The assessee perferred a claim against the Government for a sum of Rs. 1,65,275-5-6 as compensation for the use of the property by the Government. There being a dispute as to the amount of compensation payable, the matter was referred for adjudication by an arbitrator under section 19 (1) (*b*) of the Defence of India Act, 1939. The arbitrator (the District Judge of North Arcot) made an award, holding that the assessee should be paid a

sum of Rs. 63,249-12-0 as compenstion. There was an appeal to this Court from the decision of the arbitrator, but without success. Even before the arbitrator, the Government pleaded that the compensation awarded would be liable to the deduction of the income-tax at source. The arbitrator held that the tax could not be so deducted, as income-tax, if leviable could be so done only in the next year. The compensation amount was received by the assessee on 31st May, 1948. In the assessment year 1949-50 (year of account ending on 31st May, 1948), the Income-tax Officer, First Circle, Madras, included the sum of Rs. 63,250, for assessment. The inclusion of that sum was contested on behalf of the assessee on the ground that it represented only a capital receipt. The contention was, however, overruled both by the Income-tax Officer and on appeal by the Assistant Appellate Commissioner. On further appeal to the Tribunal, it was held that the requisition of the property at Arkonam by the Government was an incident in the business career of the assessee, and there being no deprivation of the profit-earning asset as such, the compensation received would be a revenue receipt, and not a capital one. It is the propriety of that conclusion that is contested in this reference.

On behalf of the assessee, it is contended that the compensation of Rs. 63,249-12-0 could not be held to be received in the course of the business of the assessee, and that the nature of the payment was damages for the disturbance to the assessee's business at Arkonam. As the effect of the requisition of the property was to sterilise or destroy in part the profit-making apparatus to the assessee, the compensation received therefor could, it was contended, be only a capital receipt.

To appreciate properly the nature and quality of the compensation amount, whether it was for the loss of a capital asset or for loss of profits, it is necessary to ascertain for what, the compensation was intended or paid. The assessee claimed that he was entitled to compensation under four heads:—(1) the valuation of the lands and buildings, (2) loss of income, (3) for the transport of the machinary from Arkonam to Katpadi and (4) war-risk insurance premium. As the user of the property was only temporary, there was no question of the assessee getting its value; the Government offered to the assessee rent for the period of occupation. The expenses for transporting the machinery was also agreed to be paid. Therefore, at the time when the matter came up before the arbitrator, the only substantial points in dispute were the claim on the basis of loss of income and the insurance premium.

It is not, however, the nomenclature or the description by the assessee that will decide the nature and quality of the compensation amount. The assessee became entitled to the compensation amount by virtue of the statute, and one has to look into the provisions of the statute to ascertain for what purposes or injuries the compensation was payable. The requisition was made under Rule 75-A of the Defence of India Rules. Section 19 of the Defence of India Act provides for compensation in cases where properties were taken over by the Government (acquired or requisitioned) under the Act or the Rules made thereunder. The relevant portions of that section runs:

"19. (1) Where by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out, that is to say:—

(a) ....

(b) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of section 220 of the above-mentioned Act for appoinment as a Judge of a High Court.................

....

(e) The arbitrator in making his award shall have regard to—

(i) the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and

(ii) whether the acquisition is of a permanent or temporary character."

Under section 23 of the Land Acquisition Act, one of the matters to be considered in determinating compensation is

> "damages (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings."

The compensation paid would, therefore, include damages for the injury caused to the owner in the enjoyment of his other property, for example, a business. The rent received by the assessee from the Government in respect of the property was assessed by the Income-tax Officer, and that is no longer in dispute. The compensation would, therefore, represent only the loss occasioned to the assessee by reason of his being compelled to remove the machinery from Arkonam, that is, for being prevented in carrying on his business at the Arkonam factory premises. There was, however, no prevention of the business as such as, in spite of the requisition, the assessee could have located the factory at a different place in Arkonam itself. The assessee chose to take the factory to Katpadi. There was, no doubt, an inevitable delay in the commencing and carrying on the oil-mill business, by reason of the requisition. But, at the same time, there was an injury to the assessee in the sense that he could not carry on the factory in his own premises at Arkonam, and that there was some delay occasioned in the commencement of the business.

The compensation was assessed by the arbitrator on the basis of the profits earned by the assessee at Katpadi. This could be understood only as affording a basis for the measure, or quantum of compensation and not as deciding the nature of it. In other words, from the mere fact that the compensation paid to the assessee was based on the foot of the income, it cannot be held that it was the income from the business. The character of the receipt has to be decided on a consideration of the legal basis of the claim, and on the other facts in the case.

It was argued on behalf of the assessee that the receipt was a capital one. According to the learned counsel for the assesee, there was an injury to the profit-earning asset of the assessee by reason of his being deprived of the opportunity of starting his business at Arkonam, and to that extent, his capital asset should be deemed to have been sterilised. In *Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue*[1], the assessee-company, who were manufacturers of fireclay goods, had a leasehold right over certain fireclay fields. A railway line ran over a part of the property. The Railway Company were, however, only the owners of the land (surface) but not of the minerals beneath which vested in the assessee. The Railway company, in the exercise of its statutory powers, required that the part of the fireclay area which was under the railway line should be left unworked, and for that purpose, the assessee was paid a compensation. A question arose whether the compensation amount received by the assessee would be liable to tax. It was held that the compensation received was a capital receipt, being one paid for the sterilisation of the fireclay deposits ; the fact that actually the compensation amount was computed on the basis of the profits which would have been earned by working the fireclay, was held to be immaterial. In delivering judgment Lord President Clyde observed at page 448 :—

> "In short, the position so far as the company was concerned was that it had been permanently excluded from the beneficial possession and enjoyment of certain portions of its fixed assets, and the value of its undertaking was correspondingly diminished. That is the injury which the statutory compensation is provided to repair. Can that compensation be said to be part of the "profits arising from the trade or business" of the company, or of the "annual profits or gains arising or accruing" to the company from its trade ? It is obvious that it did not arise or accrue by or through any of the processes whereby the company's trade or business is carried on. On the contrary, it was paid because the company was prevented from applying any of those processes to the fireclay in the areas affected directly or indirectly by the embargo. It was not a profit derived from the carrying on of the company's trade or business ; it was paid because the company was wholly deprived of the opportunity to carry on its trade or business so far as the fireclay in the affected areas was concerned........But *prima facie* the sterilisation of parts of them seems to me to imply a capital loss and the payment of compensation to repair the injury to the company's undertaking wh ch flowed from that sterilisation seems to me to be a restoration of capital".

1. (1922) 12 T.C. 427.

Lord Mackenzie observed (page 459) that a sum which was paid in place of profits which would not be made would not fall within the definition of annual profits arising from trade, and that the sum received in that case was in the nature of a windfall. This view was affirmed by the House of Lords, which held that the compensation paid was to prevent the company from obtaining the full benefit of the capital value of that part of the mines which they were prevented from working. Whether that was regarded as a sale of the asset out and out, or merely one preventing the acquisition of profit that would otherwise be gained, it was capital in nature. It will be noticed that the case related to the permanent taking away of a part of trading asset, that is, the fireclay mines beneath the railway line. That portion of the fireclay was no longer available to the owner, and though in form it was a prevention, in substance it deprived the user of that part of his asset for all time.

In *Commissioner of Income-tax* v. *Vazir Sultan and Sons*[1] the assessee was appointed originally as the sole agent for Hyderabad State in regard to cigarettes manufactured by a company, and allowed a discount of two per cent., on the gross selling price. The area of the assessee's activity was subsequently enlarged, so that they were able to earn the discount of two per cent., not merely on the sale in Hyderabad State, but outside as well. Later, however, the assessee company reverted to the original arrangement, confining the agency to the Hyderabad State alone, and the assessee was paid a particular sum by way of compensation for the loss of agency in respect of territory outside the State. A question arose whether that sum of money was revenue receipt assessable to income-tax, or a capital receipt not so assessable. It was held that the agency agreement, with respect to the territory outside the Hyderabad State, was as much a part of the assessee's profit-earning apparatus as that inside that State, and would, form part of the capital, and that the compensation paid for terminating the portion of the agency would be a capital receipt. In rendering the judgment, the Supreme Court analysed the principles which should guide in the determination of the question whether a receipt for the termination of an agency contract was a capital or a revenue receipt. It was held that decision of the question would depend on the further question, whether the agency agreement, for the cancellation of which the payment was made to the assessee, was a capital asset of the assessee's business, and constituted its profit-making apparatus, or stock-in-trade of the agency business.

An agency contract need not always be a capital asset : it may be a stock-in-trade. For instance, where a sole agency is in connection with the business of the employer, the agreement would be a profit-earning apparatus of the agent; but where on the other hand the agent runs several businesses, one or more of which is done as an agent, such part of the activity could well be one in the course of his business, and then it would only be a stock-in-trade. Compensation paid for the termination of the contract in such cases would, in its nature, be different. In the former case, the compensation being for the destruction of the profit earning apparatus, will be a capital receipt. In the latter, the compensation will be for a part of the stock-in-trade, and it will be a trading receipt.

In *Godrej & Co.* v. *Commissioner of Income-tax*[2], the assessee was appointed as managing agent of the company for a period of 30 years, and was entitled under the agreement to a commission at the rate of 20 per cent., on the net profits of the company. Later, however, the company wanted to reduce the rate of commission and the parties entered into a contract, by which the commission was so reduced, on the company paying the assessee a sum of Rs. 7,50,000 as compensation. The Supreme Court held that that sum was paid and received not to make up the difference between the higher remuneration and the reduced remuneration for the unexpired period of service of the assessee, but as a compensation for releasing the company from the onerous terms as to remuneration, which it was bound to pay under the existing contract, and that the assessee received the amount as compensation for deterioration or injury to the managing agency by reason of the release of its right to get higher remu-

1. (1959) 36 I.T.R. 175: A.I.R. 1959 S.C. 814.

1. (1960) 1 M.L.J. (S.C.) 55 : (1960) 1 An W.R. (S.C.) 55 : (1960) S.C.J. 166 : (1959) 37 I.T.R. 381.

neration, and was, therefore, a capital receipt. In that case, as a result of the revised contract, there was a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus, and that deterioration being of an enduring kind was held only to be a capital receipt.

In both the cases cited above, there was a deprivation of the profit-earning apparatus, though such deprivation related only to a part thereof, and it was held that compensation for such deprivation could only be a capital receipt, and not a revenue receipt. That is to say there was a destruction of a part of an agency contract which was the capital asset of the assessee : the compensation received for the deprivation of that asset would not be a trading receipt, as it was not the trade that brought the money but the annihilation of it. But as pointed out before, there may be cases where the termination of an agency contract could be considered only as an injury to the stock-in-trade. *Commissioner of Income-tax* v. *Rai Bahadur Jairam Valji*[1], affords an example of the latter category. In that case, the assessee had several contracts with various persons. One of the contracts was for the supply of limestone, etc., to a company. That contract was terminated by paying a compensation to the assessee. The question whether the amount received by way of compensation was a revenue receipt was answered in the affirmative. The payment of compensation was held to be a solatium for the cancellation of a contract entered into by a businessman in the ordinary course of business.

It would follow that a mere destruction or prevention of a part of a business cannot, for that reason alone, be held, to be a destruction of the profit-earning apparatus. If there is a cancellation of a trading contract, any compensation received therefor would be trading receipt. Even if the cancellation is that of any agency contract, the compensation paid would be a capital or revenue receipt accordingly as the business terminated was itself the structure of the assessee's business, or one which was entered into in the ordinary course of trade.

What then arises for consideration is, whether there is any difference in principle if there is a deprivation of or injury to the business by a paramount power. In *Commissioner of Income-tax* v. *Rai Bahadur Jairam Valji*[1], Venkatarama Aiyar, J., observed at page 166 :—

> "But apart from these and similar instances it might, in general, be stated that payments made in settlement of rights under a trading contract are trading receipts and are assessable to revenue. But where a person who is carrying on business is prevented from doing so by an external authority in exerise of a paramount power and is awarded compensation therefor whether that receipt is a capital receipt or a revenue receipt will depend upon whether it is compensation for injury inflicted on a capital asset or on a stock-in-trade ".

The learned counsel for the appellant contended that, in the present case, it should be held that there was an injury to the capital asset, in that assessee's business at Arkonam was stopped, and could not be commenced, as he intended to do. That, however, is not an accurate statement of the position. The property or building in which a manufacturer carries on his business would, no doubt, be a part of the assets of his business. In the present case, the business had not commenced. The machinery was not interfered with by reason of the requisition. The mere fact that an intended business premises were requisitioned by the Government, cannot amount to a sterilisation of a part of the business, unless it be that but for the premises, no business could be conducted. In the present case, the order of the Government did not prohibit the assessee from either doing business at Arkonam or in any other place. It only took over the building. The assessee shifted the business, at his own choice to Katpadi. The fact that he did not return to Arkonam to establish the factory after the Government vacated the premises, would indicate that the conduct of the business at Arkonam was not the essence of the assessee's business activity. Therefore, it cannot be held that the structure of the business was, as such affected. The mere occupation of a building belonging to the assessee's business without more cannot amount to an injury to or sterilisation of any profit-earning apparatus. There is great force in the contention of the learned counsel for

1. (1959) 1 M.L.J. (S.C.) 116 : (1959) 1 An. W.R. (S.C.) 116 : (1959) S.C.J. 284 : (1958) 35 I.T.R. 148 (166).

the Department, that a temporary user of the premises by the Government, or an interruption of the user thereof could not be held to be an injury of an enduring nature to amount to a sterilisation of the asset. It cannot be held in the circumstances of the case that the building at Arkonam constituted a vital part of the assessee's business structure or even affected the conduct of their business, though it may be that it was unable to realise the expected profit. The compensation awarded to the assessee cannot, therefore, be held to be a capital asset. What was received, therefore, should be income.

The question then arises whether it is a business income or income belonging to a different head or category.

In the *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.*[1], the assessee carried on a business as brewers, and in course thereof, kept large stocks of rum. Their business consisted in reducing the rum and blending it before sale. A part of the stock of the rum was taken over by the Admiralty, and compensation was paid. The question arose whether this compensation was assessable to tax as profit arising from the company's trade. It was held that the result of the transaction was that a price was paid for certain part of their stock which was in no way a compensation for interference with the trade, and that a mere absence of the will to trade could not make any difference, if the transaction was in regard to a commercial transaction, giving rise to a profit. Treating the transaction as a commercial transaction, whereby the property of the goods passed on delivery in the accounting period to the Admiralty, it was held that the money payable for the stock taken over should be taken into account in ascertaining the profits of the company. In *Ensign Shipping Co. Ltd.* v. *The Commissioners of Inland Revenue*[2], two ships belonging to the assessee, which were ready to proceed to sea with cargoes of coal, were detained in port by order of the Government for a short period, on account of strike. The company laid a claim against the Government for compensation, and they received an amount in settlement of their claim. A question arose whether the amount was taxable. It was held that the amount was paid upon the basis of reimbursement to the ship-owners, for the time that was lost by the detention of the vessels, and that it was paid to them in the course of their vessels being afloat and ready to earn as vessels under a charter, and the character and nature of payment was one which fell within the ambit of their ordinary trading account. In *Burmah Steam Ship Co. Ltd.* v. *The Commissioners of Inland Revenue*[3], the assessee had placed his motor vessel for repair in the hands of repairers with a stipulation that repairs should be completed within a particular time. There was a delay in the delivering of the motor vessel after repair, and the assessee obtained a compensation for the delay. Lord President Clyde observed at pages 72 and 73 :—

"In the present case there can be no doubt that, when the Appellant entered into the contract with the repairers, the consequences of a failure by the latter to deliver punctually, which were in the contemplation of both parties at the time, were that the appellant would be deprived of the opportunity of putting the vessel to immediate profitable use in his business. It was in respect of this deprivation that the damages were recovered. The contemplated 'hole' in the Appellant's profits was unfortunately made, and in my opinion the damages recovered must go, as a matter of sound commercial accounting, to fill that 'hole' and therefore constitute a proper item of profit in the Appellant's profit and loss account."

It was held that the amount of damages recovered would be liable to be assessed. Gunn's Commonwealth Income-tax Law and Practice (4th edition), page 49, gives reference to the decision in *A. N. W. W.* v. *N. S. W. National Coursing Association Ltd*[4]. In that case compensation was paid to the assessee for military occupation of a race-course. As the assessee was prevented from conducting race meetings there during the period of occupation, it had to conduct the meetings elsewhere. The sum given as damages was calculated as representing the sum lost by reason of the race-course having been conducted at a different place. It is stated that the Court held that the payment by way of compensation was in respect of the

1. (1927) 12 T.C. 927.
2. (1928) 12 T.C. 1169.
3. 16 T.C. 67.
4. (1951) 5 A.T.R. 114.

diminution of the assessee's profits, and therefore of a revenue nature. The actual report of the case is not, however, available.

It is, therefore, clear (1) that an operation which produces income would be taxable, whether it was received in the course of the normal trading activity or by reason of a compulsory acquisition and (2) that what is received as a compensation for the loss of income of a trade or for an injury caused by reason of an interruption to a trade could be a revenue receipt.

In *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures, Ltd.*,[1] the Supreme Court had to consider the essential characteristics of a trade receipt. The assessee in that case carried on business as a distributor of films, and he had entered into agreements for advancing monies to producers for production of films, in which the assessee was to get distribution rights for a period of 5 years. After the assessee had exploited for some time the distribution rights in films, the agreements were cancelled and the producers paid the assessee a sum of Rs. 26,000 towards commission. This was sought to be brought to tax as forming profits during the accounting year which was the subject-matter of the compensation. It was held that the amount was received in the ordinary course of the distribution business of the assessee, and the amount represented the commission which would have been earned had the contracts continued without termination, and that, therefore the sum was a revenue receipt. It was held that the material points to be considered in ascertaining whether a receipt of compensation for the termination of the contract was a trading receipt were (1) whether the agreements which were ultimately terminated were entered in the course of carrying on of the business and (2) whether the termination of those agreements would be said to have been brought about in the ordinary course of its business. Applying these tests to the present case, can it be held that there was any trade receipt? No business of the assessee was taken over or interrupted by the Government. The Appellate Tribunal held that there was a hole in the trading profits by reason of the acquisition, and the compensation which went in to fill that hole, would partake of its character. As we pointed out already, there was no interruption of the business of the assessee. The assessee had only one set of machinery, and that began functioning at Katpadi and earning profits. The capital asset existed intact and the assessee only lost the opportunity of earning profits at Arkonam. It may be that the receipts could be correlated to the ownership of the business which had to be transferred to Katpadi, but it cannot, for that reason, be said to arise out of the conduct of the business.

In *Commissioner of Income-tax* v. *Shamsher Printing Press*,[2] the premises of the assessee were requisitioned by the Government and compensation paid therefor. The Bombay High Court held that the case was one where there was an injury to the business (the assessee having continued to carry on the business) and that the receipt was of a capital nature. Chagla, C.J., observed at page 370 :—

"......or if one takes the view that the payment was entirely independent of the business of the assessee as a casual or non-recurring receipt."

In *Higgs* (*H. M. Inspector of Taxes*) v. *Oliver*[3], the assessee, who was a well-known actor entered into agreement of service with a film company. Thereby he covenanted in consideration of a sum of a money paid to him, not to act or produce or direct any film for any other persons for period of 18 months. What arose for decision was whether the sum of money received in respect of the restrictive covenant was the profit of his vocation. It was held that the sum received was outside the scope of profits or gains arising or accruing from the assessee's profession or vocation as an actor, as it was payment for abstaining from following his vocation. The Master of the Rolls observed at page 146 :—

"I think Sir Frank was disposed to agree that if a trader or a professional man for money consideration covenanted to give up his trade or profession for the rest of his life, then it would be difficult to say that the money received was 'profits or gains accruing or arising from his trade or profession'

1. (1956) 2 M.L.J. (S.C.) 21: (1956) S.C.J. 479 : 1956 S.C.R. 223 : 29 I.T.R. 910.
2. 23 I.T.R. 363.
3. (1952) 33 T.C. 136.

On the other hand, it is not difficult tosee that a restriction of a very limited or partial character might less easily be taken out of the ambit of the taxing provision. One example in the agrument was that of an actor who covenanted for a limited period not to act for one particular company out of a large number. I gave myself the example of an actor who covenanted for a limited period not to act under his own or well-known stage name. But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree. In so far as it is a matter of degree it could be, I think, a question of fact."

The present is a case where the business at Arkona m had to be given up, and the compensation paid therefor cannot be said to be for the sterilisation of the business of the assessee, nor was it income received from the business. We have already pointed out that the mere fact that the income the assessee actually derived from the same business during a later period was taken as the basis for ascertaining the quantum of compensation, cannot determine its quality or nature. In its essence the compensation was for not carrying on the business for a period. Not being income from business, the receipt should be held to fall under section 6 (v): income from other sources. The receipt, being of a casual, non-recurring nature, would be exempted from tax under section 4 (3), clause (vii) of the Indian Income-tax Act.

We, therefore, answer the question in the negative, and in favour of the assessee. The assessee will be entitled to his costs. Advocate's fee Rs. 250.

V.S. ——— *Reference answered in favour of the Assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

T. E. Mahomad Usman and others .. *Petitioners**

v.

State of Madras, by Secretary, Home Department and another .. *Respondents.*

Citizenship Act (LVII of 1955), section 9 (2) and Citizenship Rules, 1956, rule 30 and paragraph 3 of Schedule III—Validity—Termination of Indian Citizenship on the acquisition of foreign citizenship—Obtaining of the passport of the foreign State—Conclusive proof of acquistion of citizenship of that State—Passport—Nature and purpose of the document.

On the statute the act which constitutes the expatriation is stated objectively. The intention with which these acts are done are not the conditions which impart validity to or import effectiveness to them. The expression 'voluntary' is used in section 9 (1) of the Citizenship Act in contradistinction to an acquisition of citizenship by the operation of law. The term means naturalisation in the narrow sense of the term and as excluding compulsory, involuntary, or collective naturalisation which some States have adopted at different times.

No doubt a passport is an identity and travel document but it might also evidence the nationality of the person to whom it is issued. The passport granted to the petitioner is a national passport, *i.e.*, a passport which is obtainable by or granted to only a citizen of Pakistan. It is only when the assertion of Pakistan nationality by the applicant, verified and supported by the official declarant, is accepted by the passport official that a passport issues. Accordingly there is in the passport itself a statement by the Pakistani official granting it that the holder of the passport is a Pakistani national. It is by virtue and under the authority of such a document that the petitioner entered into India and he was therefore entitled to diplomatic protection at the hands of the Indian authorities who recognized the validity of the passport by granting a visa.

The question whether a person has or has not acquired the citizenship of another country is a matter dependent upon the municipal law of that country. If the authorities of that country who are vested in that behalf with the power to decide whether a person has or has not acquired the citizenship of that country have held that he has so acquired it under the relevant law and have so declared in a formal document and clothed him with the diplomatic protection which that Government offers to its nationals, it would be contrary to international propriety for the Indian authorities to embark upon an enquiry as to whether the procedural or other requirements of the Pakistani law have or have not been satisfied.

No doubt section 9 (2) of the Citizenship Act contemplates an enquiry, but the enquiry is to find out and arrive at a conclusion as to whether an Indian citizen had or had not acquired foreign nationality. If the document, *i.e.*, the passport which is the subject-matter of the rule of evidence is

* W.P. Nos. 498 and 795 of 1958. and W.A. Nos. 97 of 1958 and 46 of 1959. 17th November, 1959. (26th Kartika, 1881—Saka).

one which indisputably shows on its face that the *de cujus* had acquired foreign nationality no further enquiry would be necessary. In the face of declarations made before the Pakistan official and the declarations contained in the national passport, the rule which invests a national passport obtained in this manner as a document from which the Indian Government could draw an inference that the holder of the passport is a citizen of Pakistan cannot be held to be invalid as a rule of evidence.

The phrase ' have due regard to ' occurring in rule 30 (2) of the Citizenship Rules, 1956, indicated that the rules of evidence had not a compulsive force and the authority empowered to conduct enquiry though it normally would take it into account was not strictly bound to do so.

There is also a rational connection on the one hand between the declaration, acceptance and endorsement of the Pakistani citizenship and the presumption raised by the rules that such person has voluntarily acquired the citizenship of that country. The rule in paragraph 3 of the Schedule III is thus not beyond the rule-making power.

The Indian Evidence Act includes among its provisions some conclusive presumptions. In Indian phraseology these sections are undoubtedly rules of evidence and their enactment would be comprehended within the legislative entry relating to ' evidence '. Para 3, Schedule III, is thus only a rule of evidence and not a substantive law and not outside the scope of the rule-making power.

A formal and solemn declaration by the duly constituted authorities of a foreign country claiming the individual as their national and extending to him their diplomatic protection would certainly go very near establishing the fact of the acquisition of Pakistani citizenship which would entail the termination of the Indian citizenship. It cannot be held that the rule is beyond the rule-making power or is unreasonable.

An individual who claims that he uttered a falsehood and made misrepresentations to the Pakistani officials about his being a citizen of Pakistan and produced declarations to support that assertion which he latter says is false is certainly not entitled as of right to put forward his misconduct for disclaiming the Pakistani citizenship which he then asserted and claim that he continued to be a citizen of India especially when under the Pakistan Passport Rules as under the Indian law the making of a false declaration is a crime entailing penalties including imprisonment. A rule of evidence which in effect denies him such opportunity cannot be challenged as unreasonable in its operation.

It is open to doubt whether the test of reasonableness propounded in *Kruse* v. *Johnson*, L.R. (1898) Q.B. 91 to judge the validity of the bye-laws can be applied to rules framed under express statutory power.

Every citizen who either declares himself a ctizen of Pakistan or obtains rights or privileges which are open only to citizens of Pakistan who have migrated from India is treated as having acquired Pakistani citizenship. Undoubtedly these acts or pieces of conduct are voluntary even in the narrow sense. Paragraph 3 of Schedule III is just in line with this and there is therefore no question of Pakistan passport-holders being discriminated against on the basis of Article 14 of the Constitution.

The crucial thing to note is not the obtaining of the passport but the contents of such a passport, *i.e.*, the declarations, acceptance and endorsement of the foreign citizenship. There is no impropriety in the Indian Government proceeding on the basis of regularity of the official acts of the foreign Government.

Under the Indian Act the place where the naturalisation takes place is rendered immaterial.

If the person was not a citizen of India by reason of his acquisition of Pakistani citizenship he was a foreigner within section 2 (*a*) of the Foreigners Act, 1946, on the date when the impugned orders were served on him and consequently the direction issued to him under section 3 of the Foreigners Act, 1946, would therefore be valid.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Respondents herein to forbear from enforcing the provisions of the Foreigners' Act against the petitioner and from proceeding with the prosecution of the petitioner in C.C. No. 148 of 1958 on the file of the Court of the Additional First Class Magistrate, Vellore.

K. V. Venkatasubramania Aiyer, P. Sharfuddin, Inamdar Abdus Salam, M. K. Nambiyar, M. M. Nair and *K. K. Venugopal*, for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*M. M. Ismail*), for Respondents.

The Order of the Court was made by

Rajagopala Ayyangar, J.—These petitions and the Writ Appeals have been heard together since they involved the decision of a common question of law as to the validity of certain rules framed under the Indian Citizenship Act, 1955 (Central Act LVII of 1955) and in particular of paragraph 3 of Schedule III thereof. The

orders whose validity and legality are challenged in these four proceedings are in common form and have been passed on the directions of the Central Government either by the Collector of the District (W. P. Nos. 498 of 1958 and 795 of 1958) or by the Commissioner of Police, Madras (W.A. Nos 97 of 1958 and 46 of 1959), requiring the petitioner or the appellant as the case may be, described as the holder of a Pakistan passport, who was unauthorisedly overstaying in India, to leave India within a month of the receipt of the notice, with a warning that on failure to comply, he would be prosecuted and deported under the provisions of the Foreigners' Act of 1946.

It is common ground that the basis upon which the orders have been passed, was that these individuals were not citizens of India and even if they were at one time citizens of India they had ceased to be citizens of India by virtue of their having voluntarily "acquired the citizenship of another country", Pakistan, that their stay in India was on foot of their passports and that since the period specified in these documents had long ago expired, the Central Government were entitled to direct them to remove themselves from this country. On the other hand, the claim of the petitioners and appellants was that they were citizens of India at the commencement of the Constitution by virtue of Article 5, and that they continued to retain their Indian Citizenship till this date, that they had not acquired Pakistan Citizenship and could consequently not be treated as 'foreigners' and directed to leave India. In view of the nature of the matters thus raised for decision, it is necessary to narrate the facts of each of the cases before us in order to appreciate the position of each individual involved in each of them and we shall, therefore, deal with each case separately.

W. P. No. 498 *of* 1958.—The petitioner is said to have been born in Tiruvannamalai, North Arcot District, in or about 1910. It is admitted that he went to Pakistan in or about July, 1951, though how he managed to enter Pakistan and in what capacity is not in evidence. Desiring to come back to India he applied to the authorities in Pakistan and obtained a passport in December, 1952, and came to India and to the Madras State. In January, 1953, a visa was granted to him by the Indian authorities, and having obtained extensions of the currency of the visa he stayed on in India till March, 1954. During his stay in India he applied on 7th December, 1953, to the Government to permit him to stay permanently in India but this was refused. He left for Pakistan on 22nd March, 1954 and came back to India and to Tiruvannamalai for a second time on 28th October, 1955, on the strength of the passport issued in December, 1952, and a visa granted by the Indian High Commissioner in Karachi. The passport had a currency of five years and was, therefore, valid until the end of 1957. When the term of the visa expired he applied for its extension by four months for his stay in India, and this extension expired on 23rd July, 1956. Thereafter he applied on 14th May, 1957, under section 5 (1) of the Citizenship Act, 1955, for his registration as a citizen of India, and this was rejected by the Collector on 5th July, 1957, who, thereafter, passed an order under section 3 of the Foreigners' Act on 16th July, 1957, directing the petitioner to leave India within a month from its receipt. Meanwhile, against the orders of the Collector refusing registration, the petitioner petitioned to the State Government, and the petition was referred to the Government of India. The Government of India rejected the petitioner's application and the Collector of North Arcot was directed to take necessary action against the petitioner for his deportation out of the country. A prosecution has been launched against the petitioner for violation of the Foreigners' Act (C.C. No. 148 of 1958), and this proceeding in now pending. In these circumstances the prayer in the petition is for the issue of a writ of *mandamus* directing the State of Madras to forbear from enforcing the provisions of the Foreigners' Act against him.

The principal contention urged in the affidavit filed in support of the petition, and which was pressed before us by Mr. Venkatasubramania Aiyer, learned counsel for the petitioner, was that the petitioner was by birth and domicile a citizen of India at the date of the Constitution and had retained that character up to date,

notwithstanding the recitals in the passport which he admittedly applied for and obtained from the authorities of Pakistan, and notwithstanding the fact that he entered India only on the strength of that document, and stayed in this country since 28th October, 1955, only under a visa granted by the Indian authorities based on the Pakistan passport.

It is not in dispute that even assuming that the petitioner was a citizen of India on the date of commencement of the Constitution, he would cease to be such by becoming a citizen of Pakistan by virtue of section 9 of the Citizenship Act, 1955, and since this statutory provision is the basis of the impugned order, it is necessary to examine it in detail. This section is in the following terms :

"*Section* 9 (1).—Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India :

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence as may be prescribed in this behalf."

If the petitioner ceased to be a citizen of India, it is not contested that the order requiring him to leave India was legal and could validly be enforced. In the case of this petitioner it is not seriously contested that he was a citizen of India at the commencement of the Constitution (26th January, 1950) ; the question for consideration is whether the petitioner had or had not ceased to be a citizen of India by virtue of section 9 (1).

In furtherance of the provisions contained in section 9 (2) section 18 of the Act enacted (to refer only to the provisions having immediate relevance) :

"*Section* 18 (1).—The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—......

(*h*) the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases ".

By virtue of this rule-making power, the Indian Citizenship Rules of 1956 have been promulgated, and rule 30 of the Rules reads :

" (1) If any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purposes of section 9 (2) be the Central Government. (2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III ".

We would have to refer in more detail to the rules in Schedule III, but at this stage it is sufficient to refer to paragraph 3 of this Schedule which runs :

" The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date ".

If this rule of evidence were in terms applied to the case of the petitioner, there could be little doubt that the petitioner should be treated as having 'voluntarily acquired' Pakistani Citizenship, and the acquisition of 'Pakistani Citizenship' would *ipso facto* terminate the Indian citizenship of the petitioner by virtue of the provision contained in section 9 (1) of the Citizenship Act. In these circumstances the principal contention raised in the affidavit in support of the petition and the core of the arguments of Mr. Venkatasubramania Iyer, learned counsel for the petitioner, were that paragraph 3 was invalid and *ultra vires*, and that if the evidence afforded by the Pakistan passport obtained and held by the petitioner did not conclude the matter, the decision of the Central Government would be invalid, and the petitioner

should have to be treated as retaining his Indian citizenship, with the result that the order of deportation would be illegal.

Before proceeding to discuss the various arguments put forward by the learned counsel in support of the contention, that the petitioner still retained his Indian citizenship, it is necessary to mention that the validity of paragraph 3, and in particular the question, whether the rule was beyond the rule-making power of the Central Government conferred by section 9 (2) and section 18 of the Citizenship Act, came up for consideration before this Bench in *Dilwar Khan* v. *State of Madras*[1], and by a judgment which we rendered on 29th April, 1957, we upheld the validity of the rules.

When subsequently the same point of the validity of this paragraph was raised before Balakrishna Ayyar, J., in W.P. No. 462 of 1958, the learned Judge followed the decision of the Bench and dismissed the petition. Writ Appeal No. 46 of 1959 which is now being heard by us is an appeal from the decision of the learned Judge following the view taken by us as regards the validity of rule 3 in W.P. No. 260 of 1956. The other Writ Appeal No. 97 of 1958 is against the decision of Ramaswami, J., raising a similar point.

W. P. No. 498 of 1958 originally came on for disposal before Ramachandra Iyer, J., and as it was urged before him that our decision in W.P. No. 260 of 1956 required reconsideration because of the decision of the Supreme Court in *Ebrahim Vazir Mavat* v. *The State of Bombay and others*[2], which was stated to have relevance to the present point and which had not been brought to our notice and was, therefore, not considered by us. Ramachandra Iyer, thereupon, directed W.P. No. 498 of 1958, to be posted before a Bench, and that is how this petition comes up before us. Mr. Venkatasubramania Aiyer, learned counsel for the petitioner, referred us to the decision of the Supreme Court to which he had invited the attention of Ramachandra Iyer, J., but it is now admitted that this decision which related to the state of affairs before the enactment of the Citizenship Act does not in any way bear upon any of the points raised by him in his arguments in this petition.

Mr. Venkatasubramania Aiyer when he opened the case stated that he was challenging the constitutional validity of both sections 9 (1) and (2) of the Citizenship Act, 1955, and also, the validity of paragraph 3 of Schedule III of the Rules which we have set out earlier, but ultimately confined his attack to the validity or paragraph 3 and of sub-section (2) of section 9, giving up his case as regards section 9 (1) of the Act. We shall set out the grounds upon which the validity of section 9 (2) was attacked in its proper place, but it would be convenient at this stage to set out the grounds upon which the validity of paragraph 3 was challenged, because ultimately that would be the main point for consideration in the disposal of the writ petitions and the writ appeals.

It was contended that the rule contained in paragraph 3 was invalid as being beyond the rule-making power of the Central Government under section 9 (2) read with section 18 of the Act principally for four reasons : (1) Whereas section 9 (2) contemplated a quasi-judical inquiry into question whether the Indian citizenship had been terminated, the rule shut out any enquiry and stifled the determination of that question. (2) Paragraph 3 was not a rule of evidence, which alone was within the power of the Central Government to prescribe under section 18, but was a rule of substantive law and was, therefore, beyond the rule-making power. (3) The rule was unreasonable, applying the tests laid down by Lords Russel, C.J., in *Kruse* v. *Johnson.*[3] (4) Even if paragraph was within the rule-making power under section 9 (2) and had even been included as part of the statute itself, it was constitutionally invalid as violating Article 14 of the Constitution, because it operated to deny equal protection of the laws which was guranteed by the Article.

To these grounds Mr. M. K. Nambiar, who appeared for the appellant in W.A. No. 46 of 1959, added two more: (1) section 9 provided for the termination of Indian

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1. W.P. No. 260 of 1956.
2. (1954) S.C.R. 933.
3. L.R. 1898 Q.B. 91.

citizenship, only when the citizenship of a foreign State was acquired. That had to be determined by the Foreign law in this case the law in Pakistan. According to the Pakistan Citizenship Act of 1951, which was the statute which governed the mode in which the Citizenship of Pakistan could be acquired by foreign nationals, the obtaining of a Pakistan passport was not a mode by which a person could acquire Pakistani citizenship. The rule providing for the termination of the Indian citizenship on the obtaining of the Pakistani passport was outside the scope of section 9 (2) because, it was only the acquisition of a foreign nationality that could terminate Indian citizenship under section 9 (1). (2) Even if the taking of a Pakistani passport rendered a person a Pakistani citizen on the terms of section 9 (1) there would still have to be an enquiry, with an opportunity to the party to make representations and to adduce evidence to show that the acquisition of Pakistani citizenship was not 'voluntary', because under section 9 (1) it was only the 'voluntary acquisition' of Foreign Citizenship that operated to terminate Indian Citizenship. This last submission was with reference to the special facts in W.A. No. 46 of 1959, to which we shall advert in due course.

In view of these submissions and in order to appreciate the arguments of the learned counsel in support, it is necessary to set out the other statutory provisions bearing upon the topic. Part II of the Constitution, Articles 5 to 11, relate to Citizenship. Article 5 defines the persons who constitute citizens of India at the commencement of the Constitution.

> " *Article* 5 : At the commencement of this Constitution every person who has his domicile in the territory of India and (*a*) who was born in the territory of India ; or (*b*) either of whose parents was born in the territory of India ; or (*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India ".

Article 7 is in the nature of a proviso to Article 5, and it runs :

> " Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall be deemed to be a citizen of India :
>
> Provided that nothing in this article, shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (*b*) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

The other articles which are of immediate relevance to the cases before us are Articles 9, 10 and 11.

> " *Article* 9 : No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of Inda by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.
>
> *Article* 10 : Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.
>
> " *Article* 11 : Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship ".

The content of Entry 17 of the Union Legislative list reading "Citizenship, Naturalisation and Aliens" would have to be understood in the light of Article 11.

Before proceeding further we might point out that by reason of his domicile and birth within the territory of India the petitioner in W.P. No. 498 of 1958 could claim Indian citizenship, subject to the operation if any of Article 7, and if his proceeding to Pakistan did not amount to a 'migration' he would under Article 10 continue to be a citizen of India, subject to the provisions of any law made by Parliament. A law which Parliament might make in relation to him included one providing for the termination of his citizenship and of other matters relating to citizenship. By virtue of Article 9 a person would not be deemed to be citizen of India by birth or by reason of relationship, if he had voluntarily acquired the citizenship of any foreign State. But obviously Article 9 has application to the acquisition of citizenship of a foreign

State before the commencement of the Constitution, and is in the nature of a proviso or rider to the other articles, under which a person is treated as a citizen of India. The expression "foreign State" is defined in Article 367 as meaning any State other than India. This is, however, subject to the proviso:

"Provided that subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order".

By a declaration made under this proviso (Constitutional Declaration as to Foreign States Order, 1950, by the Governor-General) it was enacted :

"Subject to the provisions of any law made by Parliament every country within the Commonwealth is hereby declared not to be a foreign State for the purpose of the Constitution".

So that until there was legislation by Parliament the acquisition of the citizenship of any Commonwealth country including Pakistan would not have the effect of terminating Indian citizenship under Article 9 of the Constitution.

Parliament undertook legislation on the subject of citizenship in 1955 when it enacted the Citizenship Act (Act LVII of 1955). Sections 3 to 7 of this Act made provisions for the acquisition of citizenship which were by birth, descent, registration, naturalisation and by incorporation of territory. Of these it is only necessary to refer to section 5, because the petitioner made an application for registration under this provision. Section 5 is in these terms :—

"(1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories :—

(a) persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration ;

(b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India ;

(c) women who are, or have been, married to citizens of India ;

(d) minor children of persons who are citizens of India and

(e) persons of full age and capacity who are citizens of a country specified in the First Schedule :

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

Explanation.—(1) For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, or any of his grandparents, was born in undivided India.

(2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

(3) No person who has renounced, or has been deprived of, his Indian citizenship, or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section (1) except by order of the Central Government.

(4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.

(5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered ; and a person registered under the provisions of clause (b) (ii) of Article 6 or Article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later."

It would be noticed that section 5 (1) (e) refers to persons who are citizens of a country specified in the First Schedule. This has to be read in conjunction with section 11, under which,

'Every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen of India',

and the terms of section 12 which enables the Central Government to

'make provision on the basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule.'

The First Schedule sets out, *inter alia*, the Commonwealth countries and includes in that list Pakistan.

What is of immediate relevance to the matters before us is the fasciculus of sections comprising sections 8 to 10 headed, "Termination of Citizenship". Section 8 enables Indian citizens who were at the same time citizens or nationals of another country to renounce Indian citizenship, this to be registered by the prescribed authority. This was in pursuance of the intention of the Parliament to discourage as far as possible dual nationality or double allegiance in the case of those who were citizens of India, an intention which had been manifested by the Constitution itself by the inclusion of Article 9 whose terms we have already set out. Section 9 has already been set out and hence the only other provision which remains to be mentioned is section 10 under which Indian citizenship was deprived as a penalty or as a punitive measure for misconduct on the part of naturalised citizens. Section 10 enacts :

(1) A citizen of India who is such by naturalisation or by virtue only of clause (*c*) of Article 5 of the Constitution or by registration otherwise than under clause (*b*) (ii) of Article 6 of the Constitution or clause (*a*) of sub-section (i) of section 5 of this Act shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that—

(*a*) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact ; or

(*b*) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established ; or

(*c*) that citizen has, during any war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist any enemy in that war ; or

(*d*) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years ; or

(*e*) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registrered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made, notice in writing informing him of the ground on which it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (*e*) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (*e*) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a Chairman (being a person who has for at least ten years held a judicial office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference hold the inquiry in such manner as may be prescribed and submit its report to the Central Government ; and the Central Government shall ordinarily be guided by such report in making an order under this section."

We need only add that section 13 enables the Central Goverment to certify that a person with respect to whose citizenship of India a doubt exists, is a citizen of India. We have already referred to the terms of the relevant provision in section 18 in respect of the power to make rules, particularly in regard to the evidence regarding question of the acquisition of the Citizenship of another country and the terms of rule 30 of the Citizenship Rules of 1956. The second paragraph of this rule refers to Schedule III as containing the rules of evidence on this matter. Of these we have set out paragraph 3 because it was the validity of that rule which was the main subject of argument. Schedule III has five paragraphs of which we may now refer to the others.

Paragraph 1 reads:

" Where it appears to the Central Government that a citizen of India has voluntarily acquired the citizenship of any other country, it may require him to prove within such period as may be fixed by it in this behalf, that he has not voluntarily acquired the citizenship of that country ; and the burden of proving that he has not so acquired such citizenship shall be on him."

Paragraph 2 enables the Central Government to make reference to its Embassy in a foreign country for information relating to the acquisition of the Indian citizenship of a citizen of that country, and for acting on the report of information received in pursuance of such reference. We have already set out the terms of rule 3 and it is, therefore, unnecessary to restate the same. Paragraph 4 permits the Central Government to take into account certain circumstances in determining whether a citizen has or has not voluntarily acquired citizenship of any other country, and these are (*a*) whether the person has migrated to that country with the intention of making it his permanent home, (*b*) whether he has in fact taken up permanent residence in that country ; and (*c*) any other circumstances relevant to the purpose. Paragraph 5 reads:

" Notwithstanding anything contained in paragraph 4, a citizen of India shall be deemed to have voluntarily acquired the citizenship of Pakistan :—(*a*) if he has migrated to Pakistan with the intention of making it his permanent home; or (*b*) if he has obtained any certificate of domicile in Pakistan or declared himself to be a citizen of Pakistan or of Pakistan domicile ; or (*c*) if he has applied for and obtained, a right, title or interest in evacuee property in Pakistan ; or (*d*) if he has obtained a temporary permit for entry into India from Pakistan ".

It would thus be seen that though Pakistan might not have been a foreign country within the meaning of Article 9 of the Constitution because of the Governor-General's Order promulgated under Article 367 (3), the acquisition of Pakistani citizenship would terminate the Indian citizenship of a person under the Citizenship Act, 1955, and this position was not contested.

The arguments of learned counsel ranged over a very wide field, but before entering into a discussion on the points urged, it might be convenient to set out two matters—merely to put them aside. The first relates to a contention, that the rules contained in Schedule III of the Citizenship Rules, 1956, infringed 'the freedom to reside and settle in any part of the territory of India' and 'to move freely throughout the territory of India' guaranteed by Articles 19 (1) (*d*) and 19 (1) (*e*) of the Constitution. We must, however, point out that though Mr. Venkatasubramania Aiyer referred to Article 19 and to the violation of the rights guaranteed under it when he opened his case, he did not press the contention when it was realised that the rights or freedom guaranteed by Article 19 were those which inhered in citizens of India and that unless a person were "citizen of India" he could not claim those freedoms. The question whether a person was or was not a citizen of India is obviously outside the scope of Article 19, but is dependent upon the relevant law which Partliament is enabled to make under Article 11 of the Constitution and Entry 17 of the Union List. If by reason of the provisions contained in the law enacted by Parliament or rules validly framed thereunder, a person was not a citizen of India or had ceased to be a citizen of India, there could be no question of such a person claiming the protection of the rights guaranteed by Article 19. In saying this we are not oblivious to the fact that the status of a person as a citizen of the country is a most valued right, both for its own sake and as the basis of other rights and privileges, and that unless a law validly enacted terminates such a status, the individual has a right to approach the Court for vindication and protection. But that however is no warrant for invoking the provisions of Article 19 (5) as limiting the scope of the laws that Parliament might in its wisdom enact.

The second matter relates to the assistance derived from the decisions, one way or the other, relating to the validity of paragraph 3 of Schedule III of the Citizenship Rules. A Division Bench of the High Court of Andhra Pradesh in *Mahommed Khan* v. *State of Andhra Pradesh*[1], held that the rule contained in paragraph 3 was *ultra vires* sections 9 and 18 of the Citizenship Act. This decision however has been dissented

1. (1957) 2 An.W.R. 527 : A.I.R. 1957 Andh. Pra. 1047.

from in *Ghaurul Hasan* v. *State of Rajasthan*[1] by a Division Bench of the Rajasthan High Court, and by the Bombay High Court in *State* v. *Sheriff Bhai*[2]. Mr. Venkatasubramania Aiyer, learned counsel for the petitioner, did not however seek to derive any assistance from the reasoning contained in the decision of the Andhra Pradesh High Court, and similarly the learned Advocate-General f om the decisions of the Rajasthan or the Bombay High Court which upheld the validity of this rule. In these circumstances we have not considered it necessary to discuss the reasoning upon which these decisions have reached their respective conclusions.

We consider it convenient to premise the discussion of the main points urged by Mr.Venkatasubramania Aiyer, by referring to one of his submissions, that section 9 of the Citizenship Act was unusually and unreasonably harsh in that it did not provide for the several safeguards substantial and procedural, which were provided even for naturalised citizens or those who were citizens of India only by reason of Article 5 (*c*) of the Constitution, in the case of those who were citizens of India by birth or descent under Article 5 (*a*) or 5 (*b*) of the Constitution. Learned counsel urged that under section 10 of the Act before a citizen of India who was such by reason of naturalisation or by virtue of Article 5 (*c*) of the Constitution would be deprived of citizenship by the order of the Central Government, the specific grounds on which the same was effected had to be clearly set out and the person affected afforded an opportunity of making representations and to have his case referred to a Committee of Inquiry, which would function in a judicial manner, and that even after the receipt of the report of such a Committee of Inquiry the Central Government was not to make an order adverse to such citizen unless satisfied that it was not conducive to the public good that that person should continue to be a citizen of India. (Sections 10-13). It was pointed out that no such enquiry was statutorily required in the case of the termination of citizenship under section 9 (1) of the Act.

If by this line of reasoning, learned counsel desired us to draw the inference that there would be a fullfledged judicial enquiry under section 9 before the Government could hold that an Indian citizen had voluntarily acquired the citizenship of a foreign country, we must express out disagreement with the entire approach to this question Section 10 is punitive in its nature (except as to section 10 (2) (*e*), and that is he ratio of the safeguards provided by it). Besides, section 10 is practically a reproduction of section 7 of the British Nationality and Status of Aliens Act, 1914, while section 9 has come down from the U.K. Naturalisation Act, 1870, where it was section 6. Its immediate predecessor was section 13 of the British Nationality and Status of Aliens Act, 1914, where it ran :

> " A British subject who, when in any foreign State and not under disability, by obtaining a certificate of naturalisation or by any other voluntary and formal act, becomes naturalised therein, shall thenceforth be deemed to have ceased to be a British subject."

It might be of some interest to note the history of the provision which is now found in section 9 of the Indian Citizenship Act. Under the Biritish Common Law, nationality or citizenship acquired by birth was held incapable of being lost or renounced. *Calvin's case* [3] This did not give rise to any complications until there was a large scale migration from Britain to America, when difficulties were experienced when these immigrants became naturalised American subjects. They had then a plural nationality owing to the continued retention of British citizenship, not by any means a desirable state of affairs. Though the United States to start with also adopted the same principle of permanent allegiance flowing from birth within territory, by the middle of the 19th century this doctrine was abandoned. As early as 1859 Attorney-General Black upheld the existence of the fundamental right of an individual to expatriation. This principle was embodied in the U.S.A. Statute book in most solemn form by the Act of July 27, 1868, which declared :

> " Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness though the overt acts which would affect voluntary expatriation were left without specification ".

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1 A.I.R. 1958 Raj. 172.
2 A I R. 1959 Bom. 192.
3. 7 Co. Rep. 1 (*a*) (25 (*a*), 27 (*b*)) : 77 E.R. 377.

Meanwhile in England a Royal Commission was appointed in 1869 for enquiring into the laws of Naturalisation and Allegiance and as a result of the recommendation of this Commission, the Naturalisation Act of 1870, which contained section 6 was passed by the British Parliament, a rule of law which, re-enacted in successive enactments, obtained till 1948. So far as the U.S.A. was concerned by the Act of Congress of 2nd March, 1907, section 2 provided that a national of the United States

"shall be deemed to have expatriated himself when he has been naturalised in any foreign State, in conformity with its laws or when he has taken an oath of allegiance to any foreign State".

This has continued to be the law of the United States by virtue of section 401 of the U.S. Nationality Act, 1940, when they were further enlarged by the addition of several other overt acts which were treated as proof of expatriation provisions which were enacted in the Immigration and Nationality Act of 1952 (section 349). Great Britain no doubt has departed from this principle in the British Nationality Act of 1948 the prevention of dual nationality ceasing to be the principle of legislature policy, but the reasons for the change in the law were political, and their discussion would take us far afield. We have made this, what might be considered a digression, just to point out that section 9 (1), by which the acquisition of the citizenship of the nationality of a foreign State operates to terminate the citizenship of the *de cujus*, is nothing out of the ordinary, and a provision on the same lines as in section 9 is found in the laws of several other countries, in which provison on exactly the same lines as in section 10 of the Act is made, where punitive action is taken by the State against a citizen for deprivation of citizenship. (Compare sections 15 and 19 of the Canadian Citizenship Act, 1946 and sections 17 and 21 of the Australian Nationality Act, 1920 and 1946 to refer to some only by way of example). Statutory expatriation was seized upon as the answer to problems of international relations and for the avoidance of friction arising out of the conflicting claims to allegiance. The underlying principle was that no man shall be permitted deliberately to place himself in a position where his services may be claimed by more than one Government and his allegiance may be due to more than one State.

Before proceeding to examine the details of the arguments addressed to us, we would refer to a general submission of Mr. Venkatasubramania Aiyer regarding the manner in which we should approach this question, as to whether or not an Indian citizen had by his act rendered himself an alien. In regard to this matter he drew our attention to and laid considerable stress on a few decisions of the Supreme Court of the United States, the reluctance they exhibited in holding that a citizen of that country had renounced his status as a citizen, the strict proof they insisted on before they would so hold and generally their interpretation of the relevant law enacted by Congress. But we consider that the American decisions are no guide because of the vital differences between the Constitutional powers of Congress and of the Indian Parliament. The status of citizenship acquired by birth was protected from congressional control by the XIVth Amendment:

"All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside".

Expatriation is not so much as mentioned in the Constitution and legislation on the subject had to rest on the congressional power over foreign affairs. But on the other other hand Article 11 of the Indian Constitution specifically confers on Parliament the power to make laws relating *inter alia* to the 'termination' of citizenship.

To come back to the argument addressed to us we consider that it would be convenient to analyse first the provisions contained in section 9 (1) of the Citizenship Act, and then the law relating to citizenship generally, and in particular that relating to the obtaining of passports under the law of Pakistan, as a preliminary to the consideration of the points raised as regards the validity of paragraph 3 of Schedule III of the Citizenship Rules, 1956. We need hardly mention that the case of the respondent that the petitioner had ceased to be a citizen of India is wholly rested on the terms of section 9. The critical words of the section are:

(1) that a citizen of India should by naturalisation, registration or otherwise, acquire the citizenship of another country; (2) such acquisition should be voluntary.

Article 9 of the Constitution itself had made provision for the cessation of Indian citizenship by voluntary acquisition of the citizenship of a foreign State This would have certainly covered the period upto 26th January, 1950. Section 9 (1) makes provision for the effect of an acquisition of foreign citizenship principally in two periods : (1) between 26th January, 1950 and the commencement of the Citizenship Act (30th December, 1955) and (2) the period after the commencement of the Act. In the first mentioned case the termination of Indian citizenship is to be at the commencement of the Citizenship Act ; in the other it would be at the moment of such acquisition. In the case of the petitioner in W.P. No. 498 of 1958 and also of the individuals involved in the other proceedings, the passport was applied for and obtained from the Government of Pakistan, after the enactment of the Pakistan Citizenship Act, 1951, that is during the period from 26th January, 1950 to 30th December, 1955, so that if their contentions regarding the validity of the orders passed against them are rejected their status as citizens of India would have been terminated on 30th December, 1955.

A point was also urged as to the meaning of the expression ' voluntary ' in section 9 (1). It was submitted that the use of this expression implied that besides the factum of the individual acquiring ' by naturalisation, registration or otherwise ', the citizenship of another country, there should be proof or opportunity for disproof, of an intention to renounce Indian citizenship leading to that act. It was urged that on that ground there should have been an enquiry in which the parties should have been given an opportunity to prove that they did not either fully comprehend the legal effect of their action, or that they had taken out the passport without their having any intention to relinquish their Indian citizenship. The same contention was presented in a slightly different form by invoking the concept of private law rules regarding mistake which invalidate a contract or disposition. As to the first we need only say that on the Statute the act which constitutes the expatriation is stated objectively ; and the intention with which these acts are done are not the conditions which impart validity to or import effectiveness to them. They operate in law, regardless, of the intentions of the actor. As regards the second, the learned Advocate-General submitted that the expression ' voluntary ' was used in section 9 (1) in contradistinction to an acquisition of citizenship by the operation of law. We consider that this submission is well founded, and that the expression ' voluntary ' is used in this section to mean ' naturalisation ' in the narrow sense of that term, and as excluding compulsory, involuntary or collective naturalisation which some States have adopted at different times.

We shall next take up for consideration the relevant provisions of the Law of Pakistan in relation to the grant of passports, because it is by virtue of the contents of the Pakistan passport, which the petitioner applied for and obtained that he has been held to have acquired Pakistan citizenship and to have therefore ceased to be a citizen of India.

No doubt a passport is an identity and a travel document, but it might also evidence the nationality of the person to whom it is issued. That is entirely a matter which is regulated by the municipal law of the State which grants the passport. It is not in controversy that the passport which has been granted to the petitioner and (similarly to the other individuals concerned in the other proceedings) is a ' national passport '; that is a passport which is obtainable by or granted to only a citizen of Pakistan. The Pakistan Citizenship Act was passed in 1951 (Pakistan Act II of 1951), and the passport system was introduced by a law promulgated on 23rd September, 1952, which was brought into force on and from 15th October, 1952 when the previous permit system was abrogated. Under the Pakistan Passport Rules, passports are issued in Pakistan for visiting India only to Pakistani nationals. Paragraph 3 of the Passport Regulations reads :

"Passports are granted to the citizens of Pakistan as defined in the Pakistan Citizenship Act, 1951, who are ordinarily residing in Pakistan ".

Paragraph 4 of this Regulation requires that the applicant for a passport should file a declaration in the prescribed form verified by a further declaration made by a

Magistrate, Justice of the Peace, any Police Officer not below the rank of Superintendent, Class I Civilian Gazetted Officer or Notary Public. In the declaration the applicant has to state his exact national status as a citizen of Pakistan—that is whether he is a Pakistani by birth, naturalisation or descent, by migration or by marriage. He is further required to state that he has not lost the status of a citizen of Pakistan thus acquired. The officer verifying the declaration has himself to declare that to the best of his personal knowledge and belief the declaration of the applicant is true, and that he had personally satisfied himself that the applicant was a fit and proper person to receive the passport. It is only when the assertion of Pakistan nationality by the applicant, verified and supported by the Official declarant, is accepted by the Passport Official that a passport issues. Accordingly in the passport itself there is a statement by the Pakistan official granting it that the holder of the passport is a Pakistani national.

It is by virtue and under the authority of such a document that the petitioner entered into India, and he was therefore entitled to diplomatic protection at the hands of the Indian authorities, who recognised the validity of the passport by granting a visa.

Alverton, C.J., defined a passport in *R.* v. *Brailsford*[1],

" Issued in the name of the sovereign on the responsibility of the Crown to a named individual intended to be presented to the Governments of foreign nations and to be used for individual protection as British subject in foreign countries '.

The ' national ' passport issued to the petitioner in the present case entitled the holder to receive diplomatic protection. One queston of general importance which would be raised by this state of affairs would be whether the petitioner could invoke the passport and claim diplomatic protection of the Pakistan Government while in Indian territory, and at the same time also claim to be an Indian citizen and insist upon his rights as such. By reason of the obtaining of passports from Pakistan authorities it is clear that he owed allegiance to that Government, and the law on this point has been authoritatively laid down by the decision of the House of Lords in *Joyce's case*[2]. In that case a British passport had been issued in error to an American citizen, but this was not held to impair the allegiance which the passport-holder owed to the British Crown by reason of his acceptance of the diplomatic protection afforded by the passport. The underlying intention of Article 9 of the Constitution and similarly of section 9 of the Citizenship Act undoubtedly was (that except in the case of dual nationality arising by reason of differences in the laws of various countries and not due to the voluntary acts of the individual) to ensure that there shall be no divided loyalties, and that no person shall play fast and loose with the allegiance he owed to this country, and by his voluntary act obtain at one and the same time the protection of two Governments. That object would completely be defeated if we were to hold that the obtaining of a national passport of another country did not terminate Indian citizenship.

It has further to be mentioned that the question, whether a person has or has not acquired the citizenship of another country, is a matter dependent upon the municipal law of that other country. If the authorities of that country, who are vested in that behalf with the power to decide whether a person has or has not acquired the country's citizenship, have held that he has so acquired it under the relevant law and have so declared in a formal document and clothed him with the diplomatic protection which that Government offers to its nationals, we consider that it would be contrary to international propriety for the authorities of this state to embark upon an enquiry as to whether the procedural or other requirements of the Pakistan law have or have not been satisfied.

It is common ground that the orders under section 3 of the Foreigners Act directing the petitioner (and similarly) the individuals involved in the other proceedings before us) to leave India are based on three grounds: (1) His (or their) stay

1. L.R. (1905) 2 K.B. 730. 2. L.R. (1946) A.C. 347.

in India was by virtue of the passport held by him (or them) under which he was declared a citizen of Pakistan by the Pakistan Government authorities issuing the passport and granted diplomatic protection at the hands of this country, during his stay here: (2) The declaration of the Pakistan authorities regarding his (or their) citizenship of Pakistan bound him (or them) and he (or they) could not be heard to put forward any plea that it was a mistake or could not have the legal effect which on its face it bore: (3) That if the above two points were made out, the petitioner (and similarly each of the others) had ceased to be a citizen of India and the order to leave the country could and was properly and legally issued. It would, therefore, be seen that since the fact of the obtaining of the passport is not in controversy it is really the second of the above points that is in debate. If paragraph 3 of Schedule III of the Citizenship Rules were valid, the declaration in the Passport regarding the nationality of the petitioner would be conclusive evidence of his being a Pakistani citizen, and therefore one who had ceased to be an Indian national by force of section 9 (1) of the Citizenship Act, 1955. That is how the validity of paragraph 3 of Schedule III assumes crucial importance.

We shall now take up for consideration the several points urged by Mr. Venkatasubramania Aiyer and Mr. M. K. Nambiar in support of their contention, that this paragraph of the rules was invalid. The first ground urged was that paragraph 3 was in flat contradiction of sections 9 (2) and 18 (2) (*h*) of the Citizenship Act in that while the latter contemplated an enquiry for determining whether there had been a termination of the citizenship of India by the acquisition of citizenship of another country, the rules in question, barred or foreclosed the enquiry. In our opinion, this argument is unsound and proceeds upon an incorrect appreciation of the evidentiary value of the national passport obtained under the law governing grant of passports in Pakistan. Our meaning would be made clear if we refer to an illustration. For instance, if the rule had provided for the production of an authenticated copy of the naturalisation certificate issued by a foreign State, say Pakistan, could it be said that the rule which made provision that the production of such a certificate shall be conclusive evidence of the person having acquired foreign nationality and citizenship would be invalid as precluding further enquiry as to whether the person registering himself as a foreign national did or did not intend to give up his Indian citizenship or nationality. We do not consider that it would be possible to answer this question in any other way, than to say that such a rule would be valid. No doubt section 9 (2) contemplates an enquiry, but the enquiry is to find out and arrive at a conclusion as to whether an Indian citizen had or had not acquired foreign nationality. If the document which is the subject-matter of the rule of evidence is one which indisputably shows on its face that the *de cujus* had acquired foreign nationality no further enquiry would be necessary, because the object to be attained by the enquiry is established by that document. We have endeavoured to explain the nature of the enquiry, which according to the law of Pakistan precedes the grant of passport. If according to the law of Pakistan a passport cannot and will not be issued by the authorities of that State except to a citizen of Pakistan, and the per ons involved in these proceedings have satisfied the Pakistan authorities by declaration signed by them supported by the further declarations by the officials of Pakistan regarding the truth of the statements that they were citizens of Pakistan, and the passports were obtained on the faith of those declarations, we do not see how the rule which invests a national passport obtained in this manner as a document from which the Indian Government could draw an inference, that the holders of the passports are Pakistani citizens or nationals is invalid as a rule of evidence.

In this connection some little point was made of the fact that though the Pakistani passport might indicate that its holder was a citizen of Pakistan, there was nothing in it to indicate the date on which he became or from which he should be treated as being a citizen of Pakistan. Since under section 9 (1) of the Citizenship Act the acquisition of foreign nationali y would entail the loss of Indian Citizenship only if the foreign Citizenship was acquired after 26th January, 1950, it was suggested that the obtaining of a passport would afford no indubitable evidence as to whetherthe foreign citizenship had been acquired after 26th January, 1950, and that for this

purpose at least there should be an enquiry which was precluded by the provisions of paragraph 3. This argument, however, proceeds on an error and does not take into account the fact that Pakistani citizenship came into existence only under the Pakistan Citizenship Act of 1951 (Act II of 1951), which came into force on 13th April, 1951, and therefore the citizenship of this foreign country, which was asserted in the passport, could not possibly relate to any date earlier than 13th April, 1951, which would be well within the period specified in section 9 (1) of the Citizenship Act.

The learned Advocate-General pointed out that the contention urged on behalf of the petitioner that paragraph 3 of Schedule III of the Citizenship Rules foreclosed an enquiry which was contemplated by section 9 (2) of the Act was incorrect, because of the very words in rule 30 (2) of the Citizenship Rules which read :

> "The Central Government shall in determining any such question *have due regard* to the rules of evidence specified in Schedule III".

The phrase 'shall have due regard to' he submitted indicated that the rules of evidence has not a compulsive force, and that the authority though it normally would take it into account was not strictly bound to do so, and relied for support of the observations of Viscount Simon in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[1]. We see force in this argument, though we must point out that if a citizen of India voluntarily accepted a national passport from a foreign country on the basis of his being a national of that State, it would be unthinkable for the Central Government in the face of this rule to disregard the contents of the Passport and treat the individual as a citizen of India inspite of the declaration by the foreign State in that document. Of course, if no document were available, the matter would be at large, and there would have to be evidence of the acquisition of foreign nationality before a citizen of this country could be held to have expatriated himself.

The second point urged was that the rule-making power under section 9 (2) of the Citizenship Act enabled only a rule of evidence to be prescribed but what paragraph 3 of Schedule III had promulgated was not a rule of evidence but a rule of substantive law and was consequently beyond the rule-making power. In support of this position Mr. Venkatasubramania Aiyer referred us to certain decisions of the Supreme Court of America. In particular our attention was invited to the observations in the dissenting judgment of Holmes, J., in *Bailey* v. *Alabama*[2], where the learned Judge speaking of conclusive presumptions enacted in statutes said :

> "I agree that if the statute created a conclusive presumption, it might be held to make a disguised change in the substantive law";

and to the decision in *Tot* v. *United States*[3]. Taking the second case first the point which arose in it was whether the presumption created by the statute had any rational connection between the fact proved and the fact directed by the Statute to be presumed, and on a finding that it had not, the Court held that it offended the requirement of due process. The law in question related to the imposition of a penalty on the unauthorised transport of firearms in inter-State o foreign commerce, and the enactment raised a statutory presumption of the commission of such offence, from the use of a firearm in the commission of a crime of violence. The learned Judges held that since the firearms used for the perpetration of the crime could obviously have been obtained by the criminal, without transgressing the law relating to inter-State or foreign commerce, there was no rational connection between the offence, namely, the violation of inter-State or foreign commerce and the use of the firearms in the commission of a crime of violence. We are unable to see how this decision helps learned counsel for the petitioner. Certainly there is a rational connection on the one hand between the declaration by the petitioner to the Pakistan authorities that he was a citizen of that country, the acceptance of that declaration or assertion of his by the Pakistan authorities, the endorsement of their decision in the passport which that person obtains and holds and the require-

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1. (1943) 2 M.L.J. 254 : I.L.R. (1944) Mad. 257 : L.R. 70 I.A. 129 at 168 (P.C.).
2. 55 Law. Ed. 191 at 204.
3. 87 Law. Ed. 1519.

ments of section 9 (1) of the Citizenship Act on the other; and the decision cited can therefore have no application.

Next as regards the observations of Holmes, J., in *Bailey* v. *Alabama*[1], that dictum has to be understood in the light of the content of the expression 'the rule of evidence' in the particular system of law. The Indian Evidence Act includes among its provisions some conclusive presumptions. In Indian legal phraseology these sections are undoubtedly rules of evidence, and their enactment would be comprehended within the legislative entry relating to 'evidence'. Apart however from this narrow and purely semantic approach, the matter may be viewed from a broader angle. The validity of the rule prescribing or making the contents of a passport presumptive or conclusive evidence of a foreign citizenship or nationality would be dependent upon the matter which has to be established before or found by, the authorities deciding the question, as to whether or not there has been a termination of Indian citizenship. What is necessary to be proved before the Indian citizenship could be terminated is the acquisition of the citizenship of a foreign country. A formal and solemn declaration by the constituted authorities of that country claiming the individual as their national and extending to him their diplomatic protection would certainly go very near establishing the fact to be proved, and consequently we do not see any impropriety or invalidity in the terms of the rule now in question. Besides, without reserving or positing a power in the Central Government to sit in judgment over the action of the Pakistan authorities and to come to a conclusion that those authorities committed an error in the interpretation or administration of their law, it cannot be held that the rule is beyond the rule-making powers.

Without going so far as to say that the Central Government is precluded from claiming an individual who has obtained a passport as a citizen of India, we are clearly of the opinion that the Government is not bound to do so. It is a common place to say that citizenship involves not merely rights but also obligations, and it is possible that when the Government was satisfied that a citizen of India was trying to evade his obligations as such by recourse to a passport obtained by fraudulent means or by false declaration from a foreign Government, it might well be that the Government will be entitled to investigate the circumstances in which the passport was obtained and not attribute to it the effect which it normally carries. But an individual who claims that he uttered a falsehood and made misrepresentation to the Pakistan authorities about his being a citizen of Pakistan and produced declarations to support that assertion, which he now says is false, is certainly not entitled as of right to put forward his misconduct for disclaiming the Pakistan citizenship which he asserted and claim that he continues to be a citizen of India, especially when under the Pakistan Passport Rules as under our own the making of a false declaration, is a crime entailing penalties including imprisonment. A rule of evidence, which in effect, denies him such an opportunity cannot be challenged as unreasonable in its operation.

Next it was said that the rule of conclusive presumption enacted in paragraph 3 was 'unreasonable'—in the sense spoken of by Lord Russel, C.J., in *Kruse* v. *Johnson*[2], and was therefore invalid. The learned Chief Justice was considering the bye-laws of a local authority and after stating that such bye-laws would be invalid if they were 'unreasonable'—amplified this expression by saying:

> "If for instance they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'."

There is more than one answer to this argument. In the first place it is open to the gravest doubt whether the test of reasonableness by which Lord Russel judged the validity of bye-laws can be applied to rules framed under express statutory power.

1. L.R. 55 Law. Ed. 191. 2. L.R. (1898) Q.B. 91,

There is at least one reported decision of the Court of Appeal in England, *Sporks* v. *Edward Ash Ltd.*[1], where Scott, L.J., specifically ruled that the *Kruse* v. *Johnson*[2], test of reasonableness could not be applied to determine the validity of regulations framed under Statutes: (See also *Taylor* v. *Brighton*[3], per Lord Greene, M.R. are at page 748-9). It might be of further interest to note that Scott, L.J., relied on the regulations then impugned having been placed on the table of both Houses before they became a law—as an argument against the applicability of the test of unreasonableness. Under section 18 (4) of the Citizenship Act, the Rules, have as soon as they are made to be laid on the table of the Houses of Parliament for not less than fourteen days, and are to be subject to such modification as the Parliament make when so laid. Again, even if the test is applied, we do not see any unreasonableness or injustice in it, which would make us say " Parliament never intended to give authority to make such a rule ". The criterion would then be, is there a rational connection between the fact to be proved and the fact laid down in the rule from which the presumption as to the existence of that fact is to be drawn. It would be seen that it is this which appears, it might be in different aspects, in several of the arguments on which the validity of the rule is challenged. What we have stated earlier ought to suffice to answer this point against the petitioner. In fact Mr. Venkatasubramania Iyer himself at one stage realised that he could not successfully contend that there was no rational connection between the fact to be proved and the impugned rule, and it was because of this that he refrained from relying on the decision of the Bench of the Andhra Pradesh High Court in *Mohammad Khan* v. *State of Andhra Pradesh*[4].

The last of the points urged by Mr. Venkatasubramania Iyer was that the rule was unconstitutional as being obnoxious to Article 14, so that even if it was within the rule-making power or had even formed a part of section 9 of the Citizenship Act, it would still be invalid. The ' equal protection of the law ' was stated to be violated in that holders of Pakistani passports were said to be discriminated against and their Indian citizenship taken away from them, whereas others were not similarly treated. It was on the basis of the same argument that the constitutional validity of section 9 (2) was impugned. This was presented in the form of a dilemma:—If section 9 (2) did not authorise the rule, section 9 (2) was good, but the rule was bad : if however section 9 (2) did authorise the rule, the section itself was unconstitutional. To examine this argument it is necessary to state and in part re-state the basic principles underlying Part II of the Constitution, the relevant sections of the Citizenship Act and the Rules. Article 5 of the Constitution treats every person born in India, or the issue of parents born in India and domiciled in the country at the commencement of the Constitution as a citizen of India. At the same time, recognising that several persons who would be Indian citizens under Article 5 had migrated to Pakistan, at the time of the Partition, it makes provisions in Article 7 for such persons not being Indian citizens, and finally Article 9 recognises the right of Indian citizens to voluntarily expatriate themselves. It is clear that the principle of *jus soli* and *jus sanguinis* enunciated by Article 5, must give rise to the problem of dual nationality, and by Article 11 Parliament is expressly vested with power to make laws providing *inter alia* for terminating Indian Citizenship. Next we have the Citizenship Act, which enacts the rules of law relating to Indian citizenship from and after the commencement of the Constitution. Sections 3 to 7 of the Act deal with the five modes by which Indian citizenship could be obtained—birth, descent, registration, naturalisation and incorporation of territory—but what is of immediate relevance are the provisions which follow which deal with the termination of citizenship. We have already pointed out that if *jus soli* or *sanguinis* determined citizenship, there was bound to be the problem of dual nationality, by reason of the operation of the laws of other countries, without any act of the individual, himself. Section 8 enables a person with dual nationality to renounce Indian citizenship. The mode of doing so is by a declaration which is registered by the prescribed authority. Section 9 deals

1. L.R. (1943) K.B. 223.
2. L.R. (1898) Q.B. 91.
3. L.R. (1947) K.B. 736.
4. (1957) 2 An. W.R. 527 : A.I.R. 1957 A.P. 1047.

with another situation in which there is a renunciation of Indian citizenship. The case contemplated is that of an Indian citizen voluntarily acquiring a foreign citizenship after 26th January, 1950. The principle underlying the section is that whatever be the case with dual nationality which a person might have owing to the operation of law, every citizen of India shall elect either to retain that citizenship or to expatriate himself, and that once he so elects, he cannot claim to retain Indian citizenship and profess a dual allegiance. The constitutional validity of section 9 (2) and that of the rule of evidence contained in paragraph 3 have to be tested with reference to this basic fact. We fail to see any foundation for the contention that holders of passports are irrationally discriminated against by the rules. An examination of the rules formulated in Schedule III show they are consistent with the basic principle underlying section 9 (1), and they cover the several modes in which or the overt acts by which an individual could signify his election to become a citizen of another country. Several overt acts are listed with reference to the election in favour of citizenship of Pakistan in particular in paragraph 5 of Schedule III which we have already extracted. Of these it is sufficient to recall sub-paragraphs (*b*), (*c*) and (*d*) which runs :

> " A citizen of India shall be deemed to have voluntarily acquired the citizenship of Pakistan, ...(*b*) if he has......declared himself to be a citizen of Pakistan or of Pakistan domicile ; (*c*) if he has applied for and obtained a right title or interest in evacuee property in Pakistan and (*d*) if he has obtained a temporary permit for entry into India from Pakistan."

Thus every citizen of India who either declares himself a citizen of Pakistan, or obtains rights or privileges which are open only to citizens of Pakistan who have migrated from India is treated as having acquired Pakistani citizenship. Undoubtedly these acts or pieces of conduct are voluntary—even in the narrow sense. Paragraph 3 is just in line with this, and there is, therefore, no question of Pakistan passport-holders being discriminated against. The overt acts set out in these paragraphs have been framed keeping in view the law in Pakistan, and since these acts are possible of accomplishment only on the footing of the individual being treated by Pakistani authorities as their national—we do not see any basis for invoking Article 14 to invalidate the provision in paragraph 3 or section 9 (2).

These four exhaust what we consider are the major points urged by Mr. Venkatasubramania Iyer. In addition he made an alternative submission on the footing that the rule was constitutional and *intra vires* of the rule-making power and was addressed to the interpretation of this rule. The argument was that paragraph 3 of Schedule III should be construed as operating only prospectively and as applying only to cases where the passport was obtained after 7th July, 1956, when the Citizenship Rules, were promulgated or at least after the Citizenship Act, 1955, came into force, that is from and after December, 1955. It would be noticed that the petitioner obtained his passport in December, 1952, and it was therefore urged that if this construction were adopted the petitioner would retain his Indian citizenship which he had on 26th January, 1950 and which he continued to possess under Article 10 of the Constitution. We are unable to uphold this contention of the learned counsel. The question, whether the provision is prospective or retrospective must depend upon the language used by the enactment. Obviously section 9 (1) covers the period between 26th January, 1950, the date of the Constitution and 30th December, 1955, when the Citizenship Act came into force. To uphold the construction urged by learned counsel would be to ignore the specific terms of section 9 (1) and to create a gap between 26th January, 1950 and 30th December, 1955, when as a fact, the terms of section 9 (1) were designed to avoid any such. If section 9 (1) were in terms retrospective from 26th January, 1950, it follows that unless the Rules contained any specific provision they would operate in so far as they related to the termination of citizenship during the same period, that is retrospectively. Learned counsel did not go so far as to say that if in the period between 26th January, 1950 and 30th December, 1955, a citizen of India applied for and obtained a formal naturalisation certificate of a foreign country, it would not have the effect of terminating the Indian citizenship as and from 30th

December, 1955. If so, there cannot be any distinction arising out of the mode in which the acquisition of foreign citizenship is to be proved. We have, therefore, no hesitation in saying that paragraph 3 of Schedule III cannot be read as confined to cases where the passport was obtained from 30th December, 1955. We need only add that the presumption raised by paragraph 3 is that the passport-holders acquired the citizenship of the foreign country before the date of issue because it is the affirmation of an earlier state of affairs that is rendered crucial.

There was one further point urged by Mr. Nambiar, who appeared for the appellant in W.A. No. 46 of 1959, which could be conveniently dealt with here. The argument ran thus : Under section 9 (1) the Indian citizenship of an individual could be lost only when he acquired the citizenship of a foreign country by 'naturalisation, registration or otherwise,' and that for the purpose of ascertaining when such foreign citizenship had been acquired, recourse must necessarily be had to the law of the relevant foreign country. In the case on hand the relevant law would be the Pakistan Citizenship Act of 1951. An examination of its provisions discloses that the grant of a passport is not a mode by which such citizenship is acquired. Hence the provision in paragraph 3 of Schedule III which imports a presumption regarding an acquisition of foreign nationality by the obtaining of a passport of a foreign country is beyond the rule-making power.

We consider that this argument is not sound and proceeds on fallacious reasoning. It is no doubt necessary that an individual should acquire a foreign citizenship or nationality before his citizenship could be terminated under section 9. This could be by 'naturalisation, registration or otherwise.' But the point still for consideration is whether or not the foreign country regards him as its citizen or national.

The fallacy in the argument of the learned counsel consists in thinking that the rule has regard only to the obtaining of the passport, whereas what is crucial is the contents of the document and in particular the declaration by the Pakistani Official that the holder of the passport has been recognised by him as a Pakistan citizen. If according to the law of Pakistan a person is not entitled to apply for or obtain a passport unless he is a citizen of Pakistan under its Citizenship Act, and a declaration made to that effect by the individual has been accepted by the Pakistan authorities, we do not see any impropriety in the Government of India proceeding on the basis that the Pakistan authorities acted properly in accordance with the requirements of their law. There certainly cannot be an enquiry contemplated in this country, after notice to the Pakistan Authorities, for determining whether their decision to accept an individual as a citizen of Pakistan was or was not correct. In addition the normal presumption in favour of the regularity of official acts would appear to support the view that this Government could properly act on the basis that the authorities in the foreign State have correctly understood and applied their law to the facts and circumstances of the case.

Besides this, the facts in Writ Appeal No. 46 of 1959 in which Mr. Nambiar appeared were as follows : The appellant was born in Quetta in 1913. It was stated that he had come to Madras in 1932 and had stayed here since then. On 1st April, 1953, he applied to the Pakistan High Commissioner at New Delhi and obtained a passport from that authority. Section 3 of the Pakistan Citizenship Act, 1951, enacts :

"At the commencement of this Act (13th April, 1951) every person shall be deemed to be a citizen of Pakistan—

(a) who or any of whose parents or grand-parents was born in the territory now included in Pakistan and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Pakistan............"

Having been born in Pakistan territory Quetta the only question was whether his residence at Madras from 14th August, 1947, was permanent or not. That obviously was dependent upon his intention and if he declared to the Pakistan

authorities that his residence in Madras was temporary, there was nothing to prevent his having been a citizen of Pakistan from 13th April, 1951. It was entirely for him to make a declaration on the topic and if the Pakistan authorities accepted that declaration and acted upon that basis we do not see how it could be contended that he was not a citizen of Pakistan or had not acquired Pakistan Citizenship. It is, therefore, an additional reason why the contention raised by Mr. Nambiar is further untenable in the case of the appellant in W.A. No. 46 of 1959.

We shall now take up for consideration the point raised by Mr. Venkatasubramania Iyer based on the provisions of the Foreigners' Act, under which the direction to the Petitioner to remove himself from India has been passed. Learned counsel submitted that assuming that section 9 of the Citizenship Act as well as the Rules including paragraph 3 of Schedule III were *intra vires* and valid, still the Petitioner cannot be directed to remove himself from India under the Foreigners' Act and prosecuted for non-compliance with that direction, because the Petitioner was not a 'foreigner' within the meaning of the Foreigners' Act, 1946. The steps in the reasoning on which the contention was urged were briefly these : The Petitioner entered India with a Pakistan Passport on 28th October, 1955. On that date the petitioner was not a foreigner because section 2 (*a*) of the Foreigners' Act, 1946, as it then stood defined a 'Foreigner' as a person who,

(i) " is not a natural born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, or

(ii) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in India ; or

(iii) is not a citizen of India."

No doubt this definition was amended by Act XI of 1957 which came into force on 19th January, 1957, by which the expression 'Foreigner' was defined to mean "A person who was not a citizen of India" omitting categories (i) and (ii); but this amendment effected in 1957 was not retrospective in its operation. Sub-section (1) of section 1 of the British Nationality and Status of Aliens Act, 1914, enacted that the following persons shall be deemed natural born British subjects, namely, (*a*) any person born within His Majesty's dominions ; and owing allegiance. The petitioner having been born in India fell within this definition of natural born British subject and was therefore, not 'a foreigner' when he entered India.

The next step in his argument was based upon the decision of a Division Bench of the Bombay High Court in *State* v. *Mahomed Khan*[1]. In that case a person who was a natural born British subject entered India on a Pakistan passport and visa valid for three months on 12th July, 1956. When he failed to leave India after the expiry of three months, he was prosecuted for contravention of Rule 7 of the Foreigners' Order, 1948, which enacts :

" Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain from the Registration Officer having jurisdiction, 'either at the place at which the said foreigner enters India or if he has entered India otherwise than on the authority of a transit visa or as a tourist as defined in the Registration of Foreigners Rules 1939, at the place at which he resides in India' a permit indicating the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period and at the time of foreigners' departure from India the permit shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs ".

Section 13 of the Foreigners Act made 'contravention of the provisions of the Act or any order made thereunder' an offence. The period for which the permit enabled him to stay in India expired, and thereafter the District Superintendent of Police issued a notice to him requiring that he should quit India within a month from the date of the receipt of the notice. As the individual did not leave India in spite of the notice, he was prosecuted for a breach of Rule 7 of the Foreigners Order, 1948, read with section 13 of the Foreigner's Act which was made punishable under section 14. The Magistrate acquitted him, and thereafter the State filed an appeal

1. A.I.R. 1959 Bom. 359.

against the order of acquittal. The learned Judges held that, as the respondent was not a 'foreigner' on the date when he entered India, he was not obliged to comply with the provisions of paragraph 7 of the Foreigners' Order, 1948, and that not being 'a foreigner' he had not committed any offence under section 13. Mr. Venkatasubramania Iyer relied on this decision and urged that the Petitioner was not 'a foreigner' when he entered India, and therefore he could not be dealt with under the Foreigner's Act. The learned Advocate-General submitted two answers to this contention. The first was that the direction to the Petitioner to leave India was one which was made under section 3 of the Foreigners' Act under which the Central Government might give directions generally with respect to all foreigners or with respect to a particular foreigner, and in this case there were individual orders passed against persons involved in the several proceedings before us with respect to their presence or continued presence in India. For the purpose of enabling the Government to pass an order under section 3 the only question was not the status of the individual when he entered India, but whether he was or was not a foreigner within section 2 (*a*) on the date when the order was passed or the direction issued. The decision before the learned Judges of the Bombay High Court was concerned with the interpretation of paragraph 7 of the Foreigners Order, which does not really bear upon the construction of section 3 of the Foreigners' Act. Even if the decision of the Bombay High Court were correct, which he disputed, the Petitioners cannot derive any advantage, unless they were citizens of India on the date of the order, since section 2 (*a*) had been amended to remove from the category of non-foreigners, British subjects within the British Nationality and Status of Aliens Act, 1914. This argument of the learned Advocate-General appears to be sound and we accept it. If the Petitioner was not a citizen of India by reason of his acquisition of Pakistan nationality he was 'a foreigner' within section 2 (*a*) of the Foreigners' Act, 1946, on the date when the impugned orders were served on him, and consequently the direction issued to him under section 3 of the Act would therefore be valid. The second submission of the learned Advocate-General was that the correctness of the decision of the Bombay High Court might be open to consideration, because of the fact that the respondent in that case entered India not in his character as a citizen of India but by virtue of his status as a citizen of Pakistan. In view, however, of the conclusion we have reached that the validity of the direction to the Petitioner under section 3 of the Foreigners' Act cannot be successfully challenged, it is unnecessary for us to embark upon any enquiry to deal with this second submission.

To appreciate the last of the points urged by Mr. Nambiar, it is necessary to set out certain matters which have been put forward by his client. As they are indeed common to W. P. No. 795 of 1958 and W. A. No. 97 of 1959 we might as well narrate the facts of each before entering on this discussion.

Writ Appeal No. 46 *of* 1959 : This is an appeal from the judgment of Balakrishna Ayyar, J., in Writ Petition No. 462 of 1958. We have referred to the fact that the appellant having been born in Quetta came over to Madras in 1932, and while remaining in India made an application to the High Commissioner for Pakistan in New Delhi and obtained a passport from that authority on 1st April, 1953. By an order dated 17th July, 1957 of the Commissioner of Police, Madras, passed on instructions from the Government of India he was directed to leave India within a month from the date of its receipt. Thereafter he applied on 19th August, 1957, to the Collector for registration as an Indian citizen under section 5 (1) of the Citizenship Act and made an application to the Central Government invoking its jurisdiction under section 9 (2) of the Act and Rule 30 of the Citizenship Rules. His application was rejected by the Central Government on 28th May, 1958. He thereupon filed W.P. No. 462 of 1958 for setting aside the order directing him to leave India. An allegation was made, that, the application for passport made by him in the beginning of 1953, was really not voluntary, but because of the pressure of the local Police

1. (1957) 2 An. W.R. 527 : A.I.R. 1957 A.P. 1047.

authorities, who threatened him with action, unless he obtained such a passport. This allegation has been denied, and the main complaint voiced in the Writ Petition was that the Central Government held no enquiry into this allegation and afforded him no opportunity to prove it. The legal ground put forward however was that the rules of evidence promulgated in Schedule III of the Citizenship Act were arbitrary, and *ultra vires* and so void, support for this being sought in the decision of the High Court of Andhra Pradesh in *Mohamed Khan* v. *State of Andhra Pradesh*[1].

The Writ Petition came on before Balakrishna Ayyar, J., and the learned Judge following the decisions of this Court in W. P. No. 260 of 1956, rejecting the contention regarding the invalidity of paragraph 3 of Schedule III of the Rules, dismissed the Petition. Hence this appeal.

Writ Petition No. 795 *of* 1958 : The Petitioner Umar Khan was born in Quetta in 1920. He states he came to India in 1935 and while staying in Andhra State applied for and obtained from the High Commissioner for Pakistan at New Delhi a passport on 28th April, 1954. Thereafter he went over to Pakistan on 21st April, 1955, on an exist endorsement granted by the Government of Andhra. Reaching Karachi and after obtaining a visa on 6th April, 1955 from the Indian Visa Officer at that place on 27th April, 1955, he re-entered India on 4th May, 1955. He proceeded to Tanjore in this State, and applied for extension of the visa and this was granted and under it he could stay in India till 4th May, 1956. He did not however leave the country and on 11th June, 1958 applied to the Collector of Tanjore for Registration as an Indian citizen under section 5 (1) of the Citizenship Act, which was rejected. The Collector issued a notice to him on 15th August, 1958 under section 3 of the Foreigner's Act directing him to leave India within a month of its receipt and as this was dated 17th September, 1958, he had to obey it by 17th October, 1958. Meanwhile the Petitioner moved this Court for the issue of a writ of prohibition challenging the validity of paragraph 3 of Schedule III of the Citizenship Rules, 1956, and obtained a rule *nisi*. An allegation similar to the one made by the appellant in W. A. No. 46 of 1959 is made by the Petitioner, that the Police Officials at Kurnool—where the Petitioner was living in 1954, compelled him to obtain a passport—which is similarly denied by the respondent.

Writ Appeal No. 97 *of* 1959.—The last matter before us, W. A. No. 97 of 1959, is an appeal against the judgment of Ramaswami, J., in W. P. No. 627 of 1957, which the learned Judge dismissed in admission. The appellant was like the others involved in this group born in Quetta in 1912. He states that he has been in India since 1924, and in Madras since 1937. While so, he obtained a passport from the High Commissioner for Pakistan in India on 7th September, 1953. There is a similar allegation that the passport was obtained—not with a view to deprive himself of Indian citizenship—but because of the pressure of the Police. He obtained a visa in 1955, and made an application for registration as an Indian citizen under section 5 (1), which was rejected. An order was passed by the Commissioner of Police, Madras, on 14th August,, 1957, and thereafter he filed the Writ Petition raising the same grounds as the others, *viz.*, the invalidity of paragraph 3 of Schedule III. Ramaswami, J., dismissed the petition on the ground that the issue of a writ of prohibition which was the relief sought was not open to the petitioner, whatever other remedies were open. It is from this judgment that this Writ Appeal has been preferred.

Before entering on the points urged by Mr. Nambiar—which as would have been seen are common to these three proceedings—we desire to state that we should not be taken to endorse the view of Ramaswami, J. (in W.P. No. 627 of 1957 against which W.A. No. 97 of 1959 has been filed), that even if the contentions urged in the petition regarding the invalidity of the Rules were made out, the individual directed

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1. (1957) 2 An.W.R. 527 : A.I.R. 1957 A.P. 1047.

by the notice to remove himself from India could not invoke the jurisdiction of this Court under Article 226 of the Constitution, or that in particular a Writ of Prohibition would not be an appropriate relief.

Mr. Nambiar pointed out that his client had obtained the passport not while in Pakistan, but during the course of his residence in this country, and that this ought to make a difference. In our opinion, there is no substance in this objection. In this connection it is sufficient to draw attention to the contrast between the language employed in section 13 of the British Nationality and Status of Aliens Act, 1914 (carrying in this respect the provisions contained in section 6 of the Naturalisation Act, 1870) and section 9 (1) of the Indian Citizenship Act. The former runs :—

"A British subject who *when in any foreign State* and not under disability, by obtaining a certificate of naturalisation...........shall thenceforth be deemed to have ceased to be a British subject."

The words we have italicised do not appear in the Indian enactment. In this respect, the Indian Act has been modelled on the American Statutory provision —section 401 of the U.S.A. Nationality Act, 1940—under which the place where the naturalisation takes place is rendered immaterial.

Considerable stress was laid by learned counsel on the fact that his client had not any education and that when he was informed by the Police that if he desired to continue his stay in India, it would be necessary for him to obtain a passport, he proceeded to Delhi and obtained such a document, and that in these circumstances he was entitled to plead in the alternative (*a*) that his naturalisation was not 'voluntary' within section 9 (1) or (*b*) that not having the intention to renounce his Indian citizenship he could claim to be a citizen of India, and that in any event the order treating him as a foreigner and directing him to leave India without giving him an opportunity to prove these facts vitiated it. We need hardly mention that if this argument were sound it would equally apply to the persons involved in the other two proceedings.

We shall premise the discussion by stating that the allegations regarding the conduct of the Police have been denied, but we shall proceed on the footing that they have been made out. We have already had occasion to point out that the expression 'voluntary' in section 9 (1) has been used as contra-distinguished from a foreign nationality resulting from the operation of the compulsive laws of the foreign State, and not dependent on the explicit consent of the individual concerned and termed in Public International law 'compulsory', 'involuntary' or 'collective' naturalisation. That apart an inference drawn that an individual has acquired the nationality of a foreign State when he has by a solemn declaration asserted and affirmed that he is a national of that foreign State—which under the law is undoubtedly a matter entirely within his volition and that declaration has been accepted, and acted upon by the accredited authorities of that State, cannot be said to transgress the rule requiring expatriation to be 'voluntary'. It is in this connection that it is necessary to stress the fact that the appellant (and the others) were born in Pakistan, and he would be a citizen of Pakistan if his residence in India since 14th August, 1947 was not intended by him to be permanent. For section 3 (*a*) of the Pakistan Citizenship Act, 1951, enacts :—

"*Section* 3.—At the commencement of this Act (*viz.*, 13th April, 1951) every person shall be deemed to be a citizen of Pakistan—

(*a*) who or any of whose parents........was born in the territory now included in Pakistan, and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Pakistan ; or....."

Looked at from the point of view of India, the position would be the same. He would be a citizen of India under Article 5 (*c*) of the Constitution, only if he had '*his domicile*' in the territory of India at the commencement of the Constitution —and domicile would be matter involving *inter alia* the intention of the party to reside permanently in this country.

The fact that the appellant made the declaration on the basis of which the passport was obtained is not in dispute, and the allegations made by him do not extend to saying that he was forced to make any false declaration. The only material factor which emerges from the allegations made is that the appellant not being educated, did not realise that by declaring his allegiance to Pakistan, and claiming Pakistan citizenship, he would be renouncing or rather denying his Indian citizenship and was liable to be treated as a foreigner. As already pointed out, section 9 lays down an objective test and when the individual has brought himself within it, the law determines the legal consequences of the situation, independently of his intent or understanding. There was, therefore, nothing to enquire into and the failure to afford the appellant the opportunity that he desired, does not vitiate the order to remove himself from the country.

The result is that the two Writ Petitions fail and are dismissed and the rules *nisi* discharged. The two Writ Appeals also fail and are dismissed. There will be no order as to costs in any of these.

V.S. ——— *Writ Petitions and Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Kalimuthu Servai and others .. *Petitioners**

v.

Govindaswami Servai and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 115 and Order 33, rule 8—Leave to sue in forma pauperis—*Revision at instance of party to dispute—Interference—Practice.*

The true principle in all cases of granting leave to sue *in forma pauperis* is that it is primarily for the State to challenge the correctness of such orders as it is the State which is mainly interested in the payment of the Court-fee. Hence the High Court will not normally interfere in revision against such orders at the instance of the parties to the dispute.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 28th November, 1959 and made in Original Petition No. 5 of 1959.

K. S. Desikan and *K. Raman*, for Petitioners.

M. Ramachandran, for Respondents.

The Court delivered the following

JUDGMENT.—This proceeding in revision is directed against the order of the learned Subordinate Judge of Kumbakonam in O.P. No. 5 of 1959, permitting the petitioner in the Court below to sue *in forma pauperis.*

The learned Subordinate Judge correctly stated that the short point for consideration was whether the petitioner had the necessary means to pay the Court-fee due on the plaint. The oral evidence is within a very short compass. I see from the records that an objection was filed by the State, in which it was affirmed that the petitioner in the Court below owned certain properties and trees, which would have enabled him to pay the Court-fee. The learned Judge was apparently unwilling to act upon the evidence of the karnam of Arayapuram (R.W. 1) and of the karnam of Papanasam (R.W. 2) ,who spoke about the properties possessed by the petitioner in the Court below. It is not clear why precisely the learned Subordinate Judge came to the conclusion that the petitioner did not have the means to pay the Court-fee in this particular case. The learned Judge correctly states the law that the fact that the petitioner might attempt to raise credit or a loan by the alienation of items forming the subject-matter of the suit itself, is no criterion. But the order does not make it clear whether the learned Judge was justified in holding

* C.R.P. No. 9 of 1960. 26th April, 1960.

that the properties referred to by R.Ws. 1 and 2 in their testimony really comprised only the subject-matter of suit, or included other independent properties also.

But, however this may be, the true principle in all such cases is that it is primarily for the State to challenge the correctness of such orders granting leave to sue *in forma pauperis*, as it is the State which is mainly interested in the payment of the full Court fee by persons who are able to do so. Reference may be made to *Chinnamani Nadar* v. *Devagimbal Rajan*[1], the judgment of Ganapatia Pillai, J., briefly reported by 71 Law Weekly (Short Notes). Hence I do not think that there is any justification for interference in revision, and the revision petition is dismissed. Under the particular circumstances, I direct that the parties shall bear their own costs.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

The Revenue Divisional Officer, Salem (Rent Controller) .. *Appellant**

v.

D. Krishnamurthi and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 3—Order allotting a house to Government servant already in possession of a residence—If invalid—Notice of requisition—Form of.

Sub-section (3) of section 3 of the Madras Buildings (Lease and Rent Control) Act, 1949, does not state as to when and in what circumstances the State Government or the authorised officer would be justified in intimating to the landlord that a building is required for the purposes mentioned in that section. Hence barring cases of *mala fides* it is not open to a Court to say that an order of requisition under the section was not justified. There is no limitation imposed under the Act that an order of requisition of a building could be made for the occupation of a Government servant only if the concerned officer was not in possession of a house already. So long as a building is required *bona fide* for the occupation of a Government servant the authorised officer is justified in making a requisition and it is not the province of a Court to investigate or hold whether in any particular case the officer was justified in making the requisition.

A notice of requisition under the section should, however, expressly intimate to the landlord the purpose for which the building is required. Further sub-section (3) of section 3 contemplates only one order requisitioning a building for any of the purposes mentioned therein and the authorised officer is not entitled to make a series of orders without any reference to the period of ten days specified. Where there is no effective or valid order passed within the period of ten days, no such order could be passed after the expiry of the period under section 3 (3) of the Act.

Appeal under clause 15 of the Letters Patent against the Order of Rajagopalan, J., dated 17th December, 1956 and made in the exercise of the Special Jurisdiction of the High Court in Writ Petition No. 234 of 1956 presented under Article 226 of the Constitution of India to issue a writ in the nature of *mandamus* or other appropriate writ or other suitable directions or orders calling for the records relating to the orders contained in R.O.C. No. 14271/55-D, dated 24th September, 1955 and R.O.C. No. 14271/55-D, dated 21st February, 1956, passed by the 1st respondent therein and directing the respondents to forbear from interfering with petitioner's right to occupy house No. 17, Sahadevapuram Extension, Salem, pursuant to those orders.

The Additional Government Pleader, (*M. M. Ismail*), for Appellant.

R. Ramamurthy, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the Judgment of Rajagopalan, J., in W.P. No. 234 of 1956. That was a petition filed by the first respondent D. Krishnamurthi for the issue of a writ in the nature of a *mandamus* or other appropriate writ to direct the Revenue Divisional Officer, Salem, who is also the Rent Controller, and one Abu Bakar, District Employment Officer, Salem, to forbear from interfering

1. 71 L.W. (Short Notes) 43.

* W.A. No. 62 of 1957. 25th November, 1959.

with the petitioner's right to occupy his house, No. 17, Sahadevapuram Extension, Salem. The first respondent who will be referred to hereinafter as the respondent purchased the house on 27th May, 1954. On the date of the purchase the house was in the occupation of a tenant who continued to occupy it till he vacated the premises on 13th September, 1955. The respondent gave the requisite notice of vacancy under section 3 (1) (*a*) of the Madras Buildings (Lease and Rent Control) Act, 1949 (Madras Act XV of 1949) to the Rent Controller, Salem, on 14th September, 1955. The notice appears to have been received by the Rent Controller on the 16th September, 1955. The respondent also informed the Rent Controller that he required the house for his own occupation. On the 24th of September, 1955, the Rent Controller, Salem, passed an order in and by which he rejected the respondent's request to be allowed to occupy the building himself and allotted the building to one C. S. Devasahayam, Commercial Tax Officer, Salem, for his residence. The respondent was directed to deliver possession of the building to allottee for his occupation forthwith. C. S. Devasahayam did not occupy the house. There appears to have been a petition to the Government to set aside the order of the Rent Controller but that was dismissed eventually. But during the pendency of that petition before the Government there was stay of the order of the Rent Controller. On 17th February, 1956, the Rent Controller passed another order informing the respondent that the building had been allotted to S. A. Visvanathan, Personal Assistant to the Collector (Estates) for his residence. By that order he purported to cancel his prior order allotting the building to Devasahayam. Even Sri Visvanatham did not occupy the house. So on 17th February, 1956, the Rent Controller passed another order cancelling his order dated 17th February, 1956 and allotting the house to Sri Abu Baker, District Employment Officer. The respondent thereupon filed an application to this Court under Article 226 of the Constitution, out of which this appeal arises. It now transpires that even Sri Abu Baker did not occupy the house and up to this date the house has been in the possession of the owner, namely, the respondent.

The writ petition was disposed of by Rajagopalan, J. He held that the Rent Controller had no authority to exercise the statutory power vested in him to requisition the premises of an owner for the purpose of finding accommodation for an officer who was already in possession of a residential house as a tenant, whatever be the inconvenience. On this ground the learned Judge quashed the order of the Rent Controller.

Another contention was raised before the learned Judge by the counsel on behalf of the respondent that the order of the Rent Controller, dated 24th September, 1955, could not be deemed to be a valid order passed in exercise of the power under section 3 (3) of the Rent Control Act. The order did not conform to the language of the enactment. The learned Judge was apparently inclined not to accept the contention. He thought that it was not the mere form or the absence of any specific words that really determined the question of jurisdiction or the issue whether the power conferred by section 3 (3) of the Act was exercised properly. At the same time the learned Judge thought it necessary to point out that statutory authorities should conform even in form to the requirements of the statutory provisions under which they exercised powers. The Rent Controller, Salem, has filed the above appeal challenging the correctness of the view taken by Rajagopalan, J. The material provisions of the Rent Control Act (Madras Act XXV of 1949) are the following :

" *Section* 3 (1) (*a*).—Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it or by the termination of a tenancy or by release from requisition, give notice of the vacancy in writing to the officer authorised in that behalf by the State Government (hereinafter in this section referred to as the authorised officer). Provided that this sub-section shall not apply to a building in respect of which the landlord has obtained an order for possession on any of the grounds specified in section 7, sub-section (3).

Section 3 (3).—If within ten days of the receipt by the authorised officer of a notice under sub-section (1) or sub-section (2) the State Government or the authorised officer does not intimate to

the landlord in writing that the building is required for the purposes of the State or Central Government or of any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself."

"*Section* 3 (5).—If the building is required for any of the purposes or for occupation by any of the officers, specified in sub-section (3) the landlord shall deliver possession of the building to the authorised officer and the State Government shall be deemed to be the tenant of the landlord with retrospective effect from the date on which the authorised officer received notice under sub-section (1) or sub-section (2)."

There is nothing in sub-section (3) of section 3 of the Act which gives any indication as to when and in what circumstances the State Government or the authorised officer would be justified in intimating to the landlord that the building is required for the purposes mentioned in that section. All that the State Government or the authorised officer has to do is to intimate that the building is required for the said purposes within ten days of the receipt by him of the notice under sub-section (1) or (2) of section 3 of the Act. In our opinion it is not open to this Court to hold in any case that the State Government or the authorised officer was not justified in intimating that a particular building is required for the purposes of the State or Central Government or of any local authority or of any public institution, or for the occupation of any officer of such Government. Of course, cases of *mala fides* will always be exceptions. If it is alleged and proved to the satisfaction of this Court that either the State Government or the authorised officer was actuated by malice and that the requisitioning of the building was *mala fide*, then this Court will certainly quash the order of the Government or the authorised officer. Except in such cases we think it does not lie in the province of this Court to find out in each particular case whether or not the State Government or the authorised officer was justified in intimating to the landlord that the building was required for purposes specified in section 3 (3) of the Act. The learned Judge has imposed a limitation that the authorised officer cannot lawfully require a building for the occupation of any officer of the State or Central Government unless the particular officer to whom it was intended to allot the building was not in possession already of a residential house as a tenant.

The learned Judge went so far as to say that even if the house which was in temporary occupation of a Government officer was highly inconvenient to him or was unsuitable on any substantial ground even then the authorised officer cannot intimate to the landlord that the building was required for the occupation of such an officer. With respect we are unable to agree with the learned Judge. To give an instance, if an officer high up in the hierarchy of Government officials and occupying a very important status and position has perforce been in occupation of a small house totally unsuitable to him and not in keeping with the position which he occupies in life desires to move into a more suitable house, it certainly cannot be said that the requisitioning under section 3 (3) of the Act would be improper or illegal. One can understand the Court holding that if it is established that the house was required not for the occupation of any Government officer but for a private person who happens to be a firiend of the Rent Controller, that it is a *mala fide* exercise of the power of the authorised officer who requisitions the building. The view taken by the learned Judge leads, in our opinion, to several anomalies. It is really that an officer of the State Government or Central Government would be stranded without a roof over his head. Nevertheless the logical result of the learned Judge's view is that unless the officer is more or less stranded without any accommodation he cannot be allotted any house by resort to section 3 (3) of the Act. Our attention was drawn to an earlier decision of the learned Judge in *Premavathi Ammal* v. *State of Madras*[1]. In that case the house was requisitioned under secton 3 (3) of the Act for the purpose of occupation of Deputy Director, Subsidiary Intelligence Bureau (Ministry of Home Affairs, Government of India), Madras, because the building which he was till then occupying was too costly for him in rent and he had accepted

1. (1955) 1 M.L.J. 454.

it as a temporary measure for want of a more suitable building. The learned Judge quashed the order of the authorised officer made under section 3 (3) of the Act because the officer in question wsa already in occupation of a house though the rent for the building was too high. The learned Judge observed thus :

" If at the time the Accommodation Controller received the notice of vacancy under section 3 (1) of the Act the Government servant for whom a house was required had no house allotted to him in which he could live as a tenant, the discretion exercised in favour of requisitioning could not have been challenged. In this case, however, Mr. Shetty had already been allotted a house but his complaint was that the rent for the building was too high . . . . Such a consideration to benefit of a Government officer to the extent of allotting a house cheaper than the one in which he was actually living at the time of the exercise of the powers under section 3 (3) of the Act, is in my opinion totally irrelevant ' in the exercise of that statutory power '".

We are unable to agree with him. If the house in question was *bona fide* required for the occupation of an officer of the State Government or the Central Government then this Court cannot go into the question whether in the opinion of this Court the authorised officer was justified in making the requisition.

Though we do not take the same view on the construction of section 3 (3) of the Act nevertheless we think that the appeal should be dismissed for another reason. Section 3 (3) confers power on the State Government or the authorised officer to intimate to the landlord that a particular building is required for one of several purposes namely (1) purposes of the State or Central Government or (2) of any local authority or of any public institution under the control of any such Government or (3) for the occupation of any officer of such Government.

The notice issued by the authorised officer under this provision should expressly intimate to the landlord for which purpose the building is required. So far as the occupation of any Government officer is concerned the notice may be in general terms, say, that the house in question was required for the occupation of State or Central Government officers. In this case there was no such order. Indeed, there is nothing in any of the orders of the Rent Controller intimating to the landlord that the building was required for any of the purposes mentioned in section 3 (3) of the Act. There is only an order allotting the house to a Government officer. We are prepared to share with Rajagopalan, J., his opinion that even if the words " required for the occupation of any officer of the State Government " were omitted but the purpose is clearly implicit there will be no such excess of jurisdiction as would justify interference by us under Article 226 of the Constitution. In the present case there is, however, another special circumstance. The first order of the Rent Controller, dated 24th September, 1955, allotted the house to one Sri Devasahayam. Actually it has turned out that he did not avail himself of that. He did not choose to occupy it. The order of the Rent Controller could not, therefore, be implemented. The only order of the Rent Controller made within ten days of the receipt by him of the notice given by the landlord under sub-section (1) of section 3 of the Act is the one, dated 24th September, 1955. Subsequent orders were beyond that date. Section 3 (3) does not contemplate a series of orders. It contemplates only one order, namely, that the building is required for any one of the purposes mentioned therein, and not that without any reference to the period of ten days specified therein the authorised officer can go on passing successive orders intimating to the landlord from time to time that the house is being requisitioned for any one of the purposes mentioned in that sub-section. On the other hand it contemplates only one order, namely, that the building is required for anyone of the purposes mentioned therein.

For this reason also we think that there has been no valid and effective order passed under section 3 (3) of the Act. We may add that the house ever since it fell vacant has been up-to-date in the occupation of the owner himself. The period of ten days mentioned in sub-section (3) of section 3 of the Act expired long ago and in our view the Government cannot now purport to exercise that power and require the building for any of the specified purposes mentioned therein. On this ground

the appeal fails. The appeal is dismissed but in the circumstances of the case there will be no order as to costs.

R.M. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE SUBRAHMANYAM.

N. R. Narayanaswami Naidu .. *Respondents**

v.

Renuka Devi Ammal and others .. *Appellant.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), sections 9 and 12-B—Execution of order of eviction—Removal of obstruction proceedings —Nature of—Finality of order—Suit to set aside summary order—Maintainability—Applicabiity of the provisions of Civil Procedure Code (V of 1908) to execution proceedings under Rent Control Act.

Though a Controller who passes an order of eviction under section 7 of the Madras Buildings (Lease and Rent Control) Act, 1949, is not a civil Court, when once such an order is before a civil Court in execution, the provisions of the Code of Civil Procedure relating to execution would apply to such proceedings in execution except to the extent to which such procedure is modified by any express provisions of the Rent Control Act.

Having regard to the limited object and scope of the orders under the Madras Buildings (Lease and Rent Control) Act, 1949, the Proviso to section 9 of the Act expressly bars an appeal under section 47 of the Civil Procedure Code in matters relating to execution of such orders. But in regard to orders passed in proceeding under Order 21, rules 97 to 103 of the Code the procedure is not in any way modified and a suit to set aside a summary order in execution under the Act is maintainable under Order 21, rule 103 of the Code.

Appeal against the decree of the Court of the Subordinate Judge, Madurai, in Original Suit No. 56 of 1955.

K. S. Ramabadra Ayyar, for Appellant.

T. R. Srinivasa Ayyangar, for 1st Respondent.

The Judgment of the Court was delivered by

Subrahmanyam, J.—The 1st defendant appeals from the judgment and decree, dated 30th November, 1955, passed by the learned Subordinate Judge of Madurai in O.S. No. 56 of 1955.

The 1st defendant had mortgaged his house in favour of one Valliyappa Chettiar. He instituted O.S. No. 358 of 1949 on the file of the District Munsiff, Madurai Town, to enforce the mortgage. A decree for sale was passed in that suit. In execution of the decree, the property was sold in Court auction on 5th March, 1951. The plaintiff, who had been impleaded in that suit as puisne mortgagee purchased the property at the auction and duly obtained a sale certificate. She applied for delivery of the property in E.A. No. 194 of 1954. At that time a portion of the house was in the occupation of the appellant and the other portions were in the occupation of three tenants. The plaintiff's witnesses say that the three tenants attorned to the plaintiff, that the 1st defendant vacated the portion which was in his occupation, that the plaintiff leased that portion to one Rajathi Ammal and that complete possession of the house was thus delivered to the plaintiff through Court. Th 1st defendant admits that the three tenants attorned to the plaintiff and that he attested the endorsement on the delivery warrant that the house had been delivered to the plaintiff through Court. In regard to the portion which was in his occupation at the time of the delivery, the 1st defendant says that Rajathi Ammal executed a lease deed in respect of that portion and that he attested that lease deed. Subsequently, the plaintiff was paying municipal taxes in respect of the property. Rajathi Ammal sent rent by money order for a few months to the plaintiff for the portion of the house covered by the lease-deed which had been executed by her. She failed thereafter to pay rent. The plaintiff filed M.B.P. No. 502 of 1954 before the Additional Rent Control-

* Appeal No. 75 of 1956. 17th November, 1959. (26th Kartika, 1881—Saka.

ler, Madurai, under the Madras Buildings (Lease and Rent Control) Act, 1949, (hereinafter referred to as the Act) for evicting her. The Additional Rent Controller passed an order under section 7 of the Act for eviction of Rajathi Ammal.

The property was situate in the City of Madurai. Under section 9 of the Act, an application for execution of the order for eviction had to be made to the District Munsif, Madurai Town. The plaintiff applied in E.P. No. 775 of 1954 on the file of the District Munsif, Madurai Town, for delivery of the property in execution of the order which has been passed against Rajathi Ammal in M.B.P. No. 502 of 1954 on the file of the Additional Rent Controller, Madurai. Delivery was ordered. When the plaintiff went to take possession, the appellant obstructed. The plaintiff filed E.A. No. 931 of 1954 under Order 21, rule 97, of the Civil Procedure Code (hereinafter referred to as the Code) for the removal of obstruction and for delivery. The District Munsif passed an order under Order 21, rule 98 of the Code directing that the plaintiff be put in possession of the property. The 1st defendant preferred an application in revision (C.R.P. No. 31 of 1955) to the District Judge, Madurai, under section 12-B of the Act. The District Judge set aside the order passed by the District Munsif. Thereupon the plaintiff instituted under Order 21, rule 103 of the Code, the suit which has given rise to this appeal praying that the summary order passed by the District Judge in C.R.P. No. 31 of 1955 be set aside. The Subordinate Judge granted the plaintiff a decree setting aside the order passed by the District Judge in C.R.P. No. 31 of 1955 on his file. The 1st defendant appeals.

The suit was instituted against the 1st defendant and his sons, defendants 2 and 3. The suit has been dismissed as against defendants 2 and 3. The plaintiff has not appealed from the decree dismissing the suit against defendants 2 and 3.

The 1st defendant pleaded that the plaintiff who had purchased the property in Court auction in O.S. No. 358 of 1959 had agreed to sell the property to the 1st defendant and that he was in possession in pursuance of that agreement. The learned Subordinate Judge found that the agreement pleaded by the 1st defendant was not true. At the hearing of the appeal, the appellant's learned counsel said that he did not propose to argue that the learned Subordinate Judge's finding on that point, was wrong. The learned Subordinate Judge has given adequate reasons in support of the conclusion that the agreement pleaded by the 1st defendant was not true. We see no reason to differ from the conclusion on that point. It follows that, provided the suit instituted by the plaintiff is maintainable the 1st defendant does not have, as regards the property ordered by the Additional Rent Controller in M.B.P. No. 502 of 1954 to be delivered to the plaintiff any title on the basis of which he could resist the plaintiff taking possession of the property through Court.

The appellant's learned counsel contends that the suit instituted by the plantiff to set aside the order passed by the District Judge in C.R.P. No. 31 of 1955 on his file is not maintainable. The argument is that the effect of sections 9, 12 (4) and 12-B of the Act is to make the order of the District Judge final and not liable to be questioned in any Court of law by way of suit or otherwise. That argument makes it necessary for us to examine the scheme of the Act in relation to orders, appeals, revision and execution embedded in sections 7, 9, 12 and 12-B of the Act.

Section 7 of the Act provides for applications for eviction being made and orders being passed either allowing or rejecting such applications. An order passed by the Controller either ordering eviction or rejecting the application under section 7 is subject to appeal under section 12. An order passed by the appellate authority under section 12 is subject to revision under section 12-B. The Controller who passes orders under section 7 is ordinarily not a civil Court. Section 12 authorises the State Government, to confer on such officers and authorities as they think fit the powers of appellate authorities for the purposes of the Act. The Government have constituted District Munsifs and Subordinate Judges appellate authorities under section 12. Section 12-B provides for revision of orders passed by an appellate authority

under section 12. The authority exercising powers of revision under section 12-B in the district is the District Court. Section 12 (4) enacts :

"The decision of the appellate authority, and subject to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of Law except as provided in section 12-B".

Execution of orders of eviction passed by the Controller under section 7 where there has been no appeal, or by the appellate authority under section 12, or by the District Judge on revision under section 12-B, is provided for by section 9 of the Act. Section 9 enacts

"Every order made under section 7 . . . . and every order passed on appeal under section 12 or on revision under section 12-B shall be executed. . . . elsewhere (than in the City of Madras) by the District Munsif. . . . . . having original jurisdiction over the area in which the building is situated. . . . . as if it were a decree passed by him".

The question whether the vesting of jurisdiction in the District Munsif to execute an order of eviction renders the procedure prescribed by the Code in relation to execution applicable to execution of the order of eviction was considered in *Thangaswany Chettiar* v. *Bapoo Sahib*[1]. The rule of law applicable to such a situation enunciated by Viscount Haldane, L.C., in *National Telephone Co., Ltd.* v. *Postmaster-General*[2] was quoted, namely :

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches."

To the same effect was the observation of Varadachari, J., in *Maruthamuthu* v. *Hindu Religious Endowment Board, Madras*[3]:

"Once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code".

The question whether execution under section 9 of the Act was governed by the provisions of the Code was thus answered in the judgment in *Thangaswami Chettiar's case*[1] delivered by one of us on behalf of the Bench that decided that case :

"Once execution proceedings under this Act are placed in the hands of the ordinary Courts, the provisions of the Civil Procedure Code relating to that subject would apply *mutatis mutandis* and so far as the nature of the machinery set up by Madras Act XV of 1946 and the provisions thereof permit."

Madras Act XV of 1946 was superseded by Madras Act XXV of 1949. The result is that, on an application for execution of an order of eviction passed by the Controller being presented to the concerned District Munsif, he has to execute the order as if it were a decree for possession passed by him. The procedure applicable is the procedure laid down in the Code in regard to execution of decrees for possession except to the extent to which such procedure is modified by express statement in the Act.

Orders passed in execution of a decree for possession are either orders passed under section 47 of the Code between the parties to the petition or their representatives-in-interest, or orders passed under Order 21, rules 98, 99 or 101 of the Code. An order passed under section 47 is subject to appeal to the Court to which appeals ordinarily lie from the Court of the District Munsiff. Against orders passed under rules 98, 99 or 101, the aggrieved party has a right of suit under Order 21, rule 103. The Legislature considered that, in view of the very restricted scope of questions likely to arise in execution between the parties to the order for eviction or their representatives-in-interest, it was not necessary that orders passed as between the parties or their representatives should be subject to appeal under section 47 of the Code. The Legislature gave effect to that decision by enacting the following Proviso to section 9 of the Act :

"Provided that an order passed in execution under this section shall not be subject to an appeal, but shall be subject to revision under section 12-B".

1. (1949) 2 M.L.J. 699.
2. L.R. (1913) A.C. 546.
3. (1937) 2 M.L.J. 175.

Orders passed under rules 98, 99 and 101 of the Code might affect title to the property as between the holder of the order for eviction and third parties. In regard to such questions there would have to be a regular trial subject to the rights of appeal provided by the Civil Procedure Code. In regard to these orders, therefore, no modification of the procedure prescribed by the Code was made in section 9 of the Act. Hence, the general rule that orders passed in execution are governed by the provisions of the Code remains in operation in relation to orders passed under rules 98, 99 and 101 of the Code.

Section 12-B enacts that in the case of an authority empowered by section 9 to execute an order for eviction and functioning in a district, the District Court concerned may exercise powers of revision. On its own language, section 12-B may appear to authorise the exercise of powers of revision by the District Judge in regard to all orders passed in execution of an order of eviction inclusive of orders passed under rules 98, 99 and 101 of the Code. But, in regard to execution, section 12-B has to be read along with section 9. Section 9 provides for powers of revision being exercised in relation only to orders which would otherwise be subject to appeal under section 47 of the Code. Section 12-B has, on this matter, the effect only of designating the authority competent to exercise the powers of revision mentioned in the Proviso to section 9 of the Act. Section 12-B does not authorise the exercise of powers of revision by the District Judge in relation to orders which will not be subject to appeal, that is to say orders governed by rules 98, 99 and 101 of Order 21 of the Code.

In *Madavi Amma* v. *Nallammal*[1], Raghava Rao, J., said in relation to an order passed under Order 21, rule 98 of the Code, in the course of execution of an order for eviction, that the order passed under Order 21, rule 98 could be revised under section 12-B of the Act. Speaking with respect, there was no discussion of the point and the background furnished by section 9 to section 12-B of the Act was not considered. On that point, that decision is hereby overruled.

The order passed by the District Judge in C.R.P. No. 31 of 1955 was an order passed without jurisdiction. The plaintiff filed a suit under Order 21, rule 103, to set aside the order and at the same time filed a C.R.P. in this Court. The C.R.P. was ultimately not pressed because of the pendency of the suit and was dismissed. The appellant's learned counsel contends that, because the C.R.P. filed by the plaintiff in this Court was dismissed as not pressed, the order of the District Judge in C.R.P. No. 31 of 1955 has become final and that an order passed under section 12-B by the District Judge is not liable to be set aside by a suit under Order 21, rule 103. The appellant's learned counsel's argument is that, since, the Act is a self-contained piece of legislation in the matter of eviction of tenants, the only provision relating to execution is the provision made in section 9 and that all orders passed in execution should be deemed to be orders passed under section 9 to which the provisions of the Code would not be applicable. It is unnecessary to enter into any discussion of that argument because *Thangaswami Chettiar* v. *Bapoo Sahib*[2] lays down that the procedure applicable to the execution of orders of eviction is the procedure prescribed by the Code, subject only to such modifications as are expressly made in the Act. In relation to orders passed in proceedings between the holder of the order of eviction and third parties, the Act does not modify the procedure prescribed by rules 97 to 103 of Order 21 of the Code. Title of third parties could obviously not have been intended by the Legislature to be investigated and finally decided in an application made under section 9 and in an application for revision made under section 12-B of the Act. We hold that the suit instituted by the plaintiff under Order 21, rule 103 was maintainable.

The next point urged by the learned counsel for the appellant is that the suit was not cognizable by the Subordinate Judge. The plaintiff prayed that the order passed by the District Judge in C.R.P. No. 31 of 1955 be set aside and that the pro-

1. (1953) 2 M.L.J. 112.   2. (1949) 2 M.L.J. 699.

perty be delivered to the plaintiff. There could of course be no decree for delivery in this suit. The decree could only set aside the order passed in C.R.P. No. 31 of 1955 and declare that the plaintiff was entitled to possession of the subject-matter of M.B.P. No. 502 of 1954. That precisely is the decree, which the learned Subordinate Judge passed. That decree entitled the plaintiff to take delivery in execution of the order of eviction, free of obstruction on the part of the first defendant. The subject-matter of the relief was valued in the plaint, for purpose of jurisdiction, at Rs. 8,000. The schedule of property appended to the plaint described the entire house and not merely the portion that had been leased to Rajathi Ammal. Since the immovable property with respect to which relief was prayed, was only the portion that had been leased to Rajathi Ammal, the value given by the plaintiff should be deemed to be the value of that portion of the house notwithstanding that the entire house was described in the schedule appended to the plaint. No objection was taken in the lower Court that the subject-matter of the suit namely, the portion of the house that had been leased to Rajathi Ammal was less than Rs. 8,000 in value or that the suit was not cognizable by the Subordinate Judge. It is not open to the appellant to state in appeal that the value of the subject-matter of the suit was not Rs. 8,000.

In the application which the plaintiff filed in the executing Court for removal of obstruction, the plaintiff said that the first defendant was a sub-tenant under Rajathi Ammal. The lower Court did not find that the first defendant was a sub-tenant of Rajathi Ammal. The lower Court considered the question of title and said that, since the plaintiff was the owner of the property and since the alleged agreement for reconveyance was not true, the plaintiff was entitled to possession. The appellant's learned counsel contends that the only question which was open for investigation by the lower Court in the suit filed to set aside the order passed in execution proceedings was the question whether the appellant was a sub-tenant of Rajathi Ammal and that the lower Court could not consider any other question relating to the plaintiff's title. We are unable to agree.

A suit under Order 21, rule 103 is not in the nature of an appeal from an order passed under rules 98, 99 or 101 of the Code. Rules 98 to 102 are intended merely to ensure that, in execution of a decree for possession obtained against *A*, *B* who is in possession is not dispossessed. If *B* is in possession of the property on the date of the decree claiming in good faith to be in possession on his own account, *B* will be entitled to retain such possession as against every person other than the true owner. Therefore so long as *B* does not claim title through *A*, *B* would be entitled to retain possession as against *D*, the holder of the decree against *A*. In such a case, if *B* is dispossessed in execution of the decree, he should be restored to possession pending determination of *D's* title as against *B*. For the same reason, if *B* was present at the spot at the time delivery is sought to be effected in execution of the decree for possession, *B* would be entitled to obstruct delivery. Such obstruction should be maintained pending determination of title. But, where *B's* obstruction is wanton and is made without just cause, he should be dispossessed in execution of the decree and any claim that he may still make to be entitled to possession should be made by him in a suit instituted by him. These are the principles that rules 98 to 102 of Order 21 embody. In a suit instituted under Order 21, rule 103, by the decree-holder who does not obtain possession, or by the person in possession who is dispossessed the questions that are tried are questions of title to possession. The argument that the question which the Court trying a suit under Order 21, rule 103, should determine are limited to the questions which were raised during the enquiry held under rules 98 to 101 is plainly untenable.

It is at the same time true that a person, *D* finding *B* in possession of property to which *D* lays claim cannot obtain a collusive order of eviction under the Act as if *A* was *D*'s tenant, and then use that order for the purpose of obtaining a warrant for delivery and, when delivery is resisted for instituting a suit under Order 21, rule 103. A collusive decree or order is void as against every person who is not a party to the decree or order. Therefore, in this case, if the order of eviction obtained by

the plaintiff against Rajathi Ammal was obtained by collusion, that order cannot, by utilisation of the machinery provided by rules 97 to 99 of Order 21 of the Code, be made the basis of a suit under Order 21, rule 103. The learned District Judge in his order in C.R.P. No. 31 of 1955 said that the plaintiff and Rajathi Ammal had colluded for the purpose of securing an order of eviction. We consider that observation groundless. Rajathi had executed a lease deed in favour of the plaintiff. The appellant had attested the lease deed. Rajathi Ammal had thereafter sent rent by money order to the plaintiff. The tenant whose eviction the plaintiff could seek under the Act was Rajathi Ammal. The application made by him under the Act for eviction and the order passed by the Rent Controller cannot, in any sense, be regarded as due to or as the result of collusion.

We find that, in this suit instituted by the plaintiff in the lower Court under Order 21, rule 103 of the Code, the lower Court was competent and indeed bound to hear and decide all the questions of title that were raised.

The last point urged by the appellant's learned counsel was that, in the decree passed by the learned Subordinate Judge, he should have set aside the summary order passed by the District Judge in C.R.P. No. 31 of 1955 on his file to the extent only of a third share in the property. The argument is that the property belonged to the appellant and his sons and that, since the suit was dismissed as against the sons, the summary order should have been set set aside in regard only to a third share. The order passed by the learned District Judge states that the appellant obstructed delivery. The Subordinate Judge says in his judgment that the appellant obstructed delivery claiming to be in possession in pursuance of an agreement for reconveyance. The Subordinate Judge finds that the alleged agreement is not true. It follows that the obstruction was made without just cause. At the proceedings before the District Judge, the appellant's sons were not parties. The summary order had to be set aside as regards only the persons who were parties to it. The Subordinate Judge who found that the property belonged to the plaintiff and that the appellant's obstruction was without justification had necessarily to pass a decree setting aside the summary order as a whole as between the persons who were parties to the summary order and could not set aside the summary order as regards only a part of it. His decree, on that point, is correct.

The appeal is dismissed with costs, subject to the formal alteration in clause 2 of the decree of the lower Court that the words " the Additional Rent Controller " be substituted for the words " The District Munsif's Court ".

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Munuswami Naidu and others .. *Petitioners**

v.

Kanniah Naidu .. *Respondent.*

Provincial Small Cause Courts Act (IX of 1887), section 25—Powers of revision under—Scope of.

It is no doubt true that the powers of revision conferred under section 25 of the Provincial Small Cause Courts Act, 1887, are wider than the powers under section 115 of the Code of Civil Procedure. But it certainly is not equivalent to an appellate power and even if the High Court is of the view that a particular conclusion upon facts could well have been different it would not be a ground for the exercise of the revisional jurisdiction.

Petitions under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Thiruvallur, dated 17th November, 1959 and passed respectively is S.C.S. Nos. 460, 360, 329 and 328 of 1959.

S. Vaidyanathan and *R. D. Indrasanan*, for Petitioners.

Respondent not represented.

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* C.R.P. Nos. 411 to 414 of 1960. 15th April, 1960 (26th Chaitra, 1882, Saka)

The Court delivered the following

JUDGMENT.—These Civil Revision Petitions have been instituted under section 25 of the Provincial Small Cause Courts Act (IX of 1887) against the judgment and decrees of the learned District Munsif of Tiruvallur in four simple small cause suits before him upon the foot of certain promissory notes. All these suits were dismissed by the learned District Munsif by means of a common judgment in which he held, upon the merits of evidence, that the suit promissory notes were not supported by consideration, that no cash was paid for them upon the occasion of their execution, and that, on the contrary, there was truth in the defence to these suits that they were executed, more or less as a kind of collateral security, in a transaction between the defendants and one Gangadhara Naidu.

Learned counsel for the revision-petitioners urges that there is a statutory presumption under section 118 of the Negotiable Instruments Act that such documents were supported by consideration, and that the presumption is strengthened in the present case because the documents *ex facie* purport to be executed for cash consideration. Learned counsel urges that the failure to keep the presumption in mind, in the discussion of facts and probabilities by the Court below, has affected the perspective of approach, and vitiated the decision. I have carefully considered this matter and I am unable to agree, for the important ground that, upon the facts, there was material justifying the inference of the Court below that the suit promissory notes were not executed for cash consideration, as they purport to have been executed. It is not necessary for me to proceed into the particulars of evidence, but I would like to remark here that the scribe who spoke to these transactions (P.W. 1) had himself intimated in an earlier letter (Exhibit A-9) that the suit promissory notes were not supported by cash consideration, and further that they were executed at the instance of Gangadhara Naidu referred to in the defence. Under those circumstances, the learned District Munsif came to the conclusion, after a discussion of the merits and probabilities, that the suit promissory notes were not supported by consideration and therefore that the suits did not lie.

Learned counsel refers to the indisputable fact that section 25 of the Provincial Small Cause Courts Act (IX of 1887) is wider in its terms and scope than section 115 of the Code of Civil Procedure. This is certainly so, and the language of section 25 of the Provincial Small Cause Courts Act *prima facie* may even justify an interference by this Court upon a question of fact, no less than upon a question of law. But I take it that the broad principle must be that this revisional power will not be used by this Court as though it were an appellate power ; even if this Court is of the view that a particular conclusion upon facts could well have been different, that would ordinarily be no ground for the exercise of revisional jurisdiction. Otherwise, as I pointed out, this section would, in practice, be invoked and worked as a section providing for regular first appeals. There is a decision of the Nagpur High Court in *Rajeshwar* v. *Dashrath*[1], to the effect that unless the conclusion of the Small Cause Court is such that no Judge acting judicially could arrive at it, interference by the High Court would not be justified. I need not proceed to this extent, but I take it that something much more must be shown than the argument that the facts of the record would warrant a different conclusion.

Accordingly, since I see no reason to admit these petitions in revision, they are dismissed *in limine*.

R.M. *Petitions dismissed.*

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1. A.I.R. 1943 Nag. 117.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Nazimbunnisa Bi and others .. *Petitioners**

v.

Syed Bashur Sahib .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955) *Rules framed under—Rule* 8*—Scope of—Applicability of the provisions of Civil Procedure Code (V of* 1908), *to proceedings under the Act.*

The wording of Rule 8 of the Rules framed under the Madras Cultivating Tenants Protection Act, 1955, is deliberately wide and does not limit itself to specific provisions of the Civil Procedure Code being made applicable to proceedings under the Act. On the other hand under rule 8 (1) the Courts constituted under the Act are clothed with the powers to function like a civil Court and sub-rule (ii) of rule 8 makes the rules under Order 9 of the Civil Procedure Code specifically applicable. Hence where an application under the Act has been dismissed for default it should be set aside by due application under Order 9, rule 9 of the Code of Civil Procedure and if it is not done so a second application on the same cause of action cannot be made to the Court under the Act.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 and section 115 of Act V of 1908 praying the High Court to revise the Order of the Sub-Collector, Tirupattur, North Arcot, dated 8th August, 1959 and made in T. P. No. 14 of 1959.

T. R. Ramachandran, for Petitioners.

R. Tirumalaiswami Naidu, for Respondent.

The Court delivered the following

JUDGMENT.—The point raised in this revision proceeding is an interesting one, and, after careful consideration, I am inclined to the view that the order of the lower Court is correct. The facts are that the revision petitioners attempted to evict the cultivating tenant under the Madras Cultivating Tenants Protection Act (XXV of 1955), upon two broad grounds (1) that the tenant denied the title of the landlords, and (2) that he was in arrears of rent, and hence liable to be evicted. The facts are that there was a previous petition upon the same averments taken on file as T. P. No. 5 of 1959, which was dismissed due to the default of appearance by the petitioners, who were in the position of plaintiffs. Without seeking to have this dismissal set aside under Order 9, rule 9, Civil Procedure Code, the petitioners filed the present petition, and the learned Sub-Collector has held that this petition was barred under the principle of Order 9, rule 9, which applied to the procedure under the Madras Cultivating Tenants Protection Act.

It is not in dispute before me that, originally, there were no such provision clothing the Revenue Court with power to make such *ex parte* orders or orders of dismissal for default of appearance, or with similar powers to have such orders set aside on cause being shown. This was pointed out and affirmed by this Court in *Chinnathirumalai* v. *Chelapati*[1]. Subsequently, rule 8 of the rules framed under the Act was formulated in the following terms :—

"8 (1). Every Court constituted under the Act shall have the powers exercisable by a Civil Court in the trial of suits ;

(ii) The proceedings of the Court shall be summary and shall as far as possible be governed by the provisions of the Code of Civil Procedure, 1908, with regard to . . . . . .

(*f*) the passing of *ex parte* orders setting them aside for good cause ;

(*g*) ordering of dismissal for default of appearance and setting aside such orders for good cause."

The argument of the learned counsel for the revision petitioners is that the wording of this rule does not directly or by necessary implication, attract Order 9, rule 9 (1), Civil Procedure Code, or its principle. The learned counsel would rely upon the decision of Satyanarayana Rao, J., in *Ayyalu Reddy* v. *Malla Reddy*[2] but

* C.R.P. No. 1633 of 1959. 18th April, 1960. (29th Chaitra, 1882, Saka).

1. (1957) 1 M.L.J. 349. 2. (1948) 1 M.L.J. 381.

that decision is totally distinguishable, and actually, even the principles of that decision were different. That decision related to rules framed in Madras as rules 104 and 105 of Order 21, Civil Procedure Code. The learned Judge pointed out that in framing these rules, a provision analogous to the one contained in Order 9, rule 9, Civil Procedure Code, was not framed, presumably advisedly, so that the bar of that rule did not apply to applications made in execution of a decree. The learned Judge further pointed out that it was a question for consideration by the Rules Committee whether it would be proper to add such an analogous provision to the Rules, regarding execution. But until that was done, a decree-holder whose execution applications had been dismissed for default, was entitled with impunity to make any number of applications so long as they were in time. I think it is obvious that the circumstances and the principle of this decision were totally different. Specific rules had been framed as part of Order 21, and a rule analogous to Order 9 rule 9, Civil Procedure Code, was not then framed as applicable to execution petitions. Further, the execution of a decree itself stands upon a different footing from a suit or petition in enforcement of rights under a law : a decree is executable until it is finally satisfied, subject to the bar of limitation. But apart from this, the wording of rule 8 set forth by me above is deliberately wide, and it does not limit to specific provisions of the Code of Civil Procedure. On the contrary, under rule 8 (i) the Court is clothed with the power to function like a civil Court in the trial of suits. Under rule 8 (ii) (*f*) and (*g*), the Court is again invested with power to act under the provisions of the Civil Procedure Code relating to these two broad categories. It seems to me to be indisputable that the rules of Order 9 in general, and particularly, rules 2 to 14 in Order 9, are concerned with (1) the passing of *ex parte* orders, (2) setting aside of such orders on due cause being shown (3) orders of dismissal for default of appearance, and (4) setting aside such orders for adequate cause. Considering the wide and inclusive language of rule 8 (ii), I do not see why it should be construed that Order 9, rule 9, alone is excluded from the scope of this amended rule. Consequently, I am of the view that the lower Court was not in error in coming to the conclusion that it was entitled to reject this second petition, for the reason that the first dismissal for default had not been set aside upon due application.

There is a further ground raised, that the denial of title by the tenant is a continuing cause of action, and not an identical cause of action as that upon which the prior application was based. It is unnecessary to go into this matter, since the learned counsel for the revision petitioners (landlords) concedes that all that the landlords are anxious about is that their title should not be repudiated, and that the tenant should pay all arrears of rent due up to date. It is thus open to the revision petitioners to send a notice to the tenant for payment of arrears of rent upon an acknowledgment of the landlord's title, and if that is repudiated, or if the rents are not so paid amounting to a repudiation by implication, the revision petitioners will certainly be at liberty to file a fresh proceeding upon the newly-accrued cause of action. Even such a notice may not be necessary, as learned counsel for the tenant states, that, even now, the title of the landlord is repudiated and not acknowledged. With these observations, this Civil Revision Petition is dismissed. The parties will bear their own costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

T. N. Chockalingam Chettiar .. *Appellant**

v.

Chidambaram Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 47, rule 1—Review—"For any other sufficient reasons"—Meaning of.

While it is true that the expression 'for any other sufficient reason' in Order 47, rule 1, Civil Procedure Code, should be construed *ejusdem generis* with the other provisions of the rule laying down the limits of the exercise of the power of review, a too narrow interpretation of the words will not be in accord with equitable principles.

Appeal against the order of the Court of the Subordinate Judge of Pudukottai, dated 30th October, 1957 and made in A.S. No. 61 of 1955 preferred against the decree of the Court of the District Munsif of Pudukottai, dated 8th September, 1955 and passed in O.S. No. 129 of 1955.

T. R. Ramachandran, for Petitioner.

N. Srivatsamani, for Respondent.

The Court delivered the following

JUDGMENT.—These are related Civil Miscellaneous Appeals from the revised judgment of the learned Subordinate Judge of Pudukottai in A.S. No. 61 of 1955, and the order in I.A. No. 169 of 1956. In C.M.A. No. 353 of 1957, the appellant is the plaintiff in the Court below, and, broadly stated, the grounds of appeal are identical with those in the related Civil Miscellaneous Appeal. In C.M.A. No. 94 of 1958, the appellant is also the plaintiff. The relevant facts which are necessary for a disposal of the matter now before me, are as follows.

A.S. No. 61 of 1955 was an appeal against the judgment of the District Munsif of Pudukottai granting a mortgage decree in favour of the plaintiff; but allowing certain reliefs to the defendants. In that suit, under Madras Act I of 1955, the question between the parties was whether the defendants were entitled to the benefits of that Act, and that was also the question which was agitated before the learned Subordinate Judge in appeal. By this judgment, dated 29th February, 1956, the learned Judge originally held that the defendants were paying land revenue exceeding Rs. 150 per annum, and that, therefore, they were disentitled to the benefits of the Act. In consequence, he allowed the appeal with costs, and modified the preliminary decree by deleting the clause relating to payment in instalments, and also payment of costs to defendants by the plaintiff. I.A. No. 169 of 1956 was subsequently filed in the lower Court for a review of this judgment, on the main ground that the judgment proceeded upon a certain admission or admissions as to matters of fact by the defendants, in the suit, particularly by the third defendant giving evidence as D.W. 1. The petitioners in this Interlocutory Application pleaded that there were other facts which ought to be taken into consideration, and which came to light by enquiry on their part, which would be sufficient to show that this admission was erroneous, though made in good faith, and ought not to have been acted upon. It is upon this basis, that the review of the judgment was sought under sections 114 and 151 of the Code of Civil Procedure and Order 47, rule 1, Civil Procedure Code.

The learned Subordinate Judge went into this matter, and came to the conclusion, with the merits of which I am not now concerned for reasons that I shall presently state, that these admissions were erroneous, and should not have been acted upon. He then properly addressed himself to the question whether he had jurisdiction to review the judgment, within the scope of Order 47, rule 1, Civil Procedure Code, particularly the words, " for any other sufficient reason " occurring

* A.A.O. Nos. 353 of 1957 and 94 of 1958.

18th April, 1960.
(29th Chaitra, 1882, Saka).

in that rule. He referred to authority for, the view that these words had to be construed *ejusdem generis* with the other categories of the rule laying down the limits of propriety, with regard to the exercise of the powers of review by a Court. But, even so, he thought that a case had been established for the grant of a review, and in the result, he allowed the application and remanded the suit for fresh hearing according to law. It is this order which is now substantially canvassed in the Civil Miscellaneous Appeals.

In view of the subsequent events, the subject-matter of controversy has now become largely academic. It is not in dispute before me that the time for payment of the decretal amount in instalments, which was available to the defendants under the provisions of Madras Act I of 1955 (even assuming that they were entitled to the benefits of this Act), has now expired, so that they are now liable to pay the decretal amount immediately. It is equally not in dispute that a final decree has been made, following the preliminary decree, determining and stating the liability. The only part of the claim which will be affected by the provisions of Madras Act I of 1955 will be the liability for costs as under that statute it is the plaintiff who is to be held liable for cost, and not the agriculturist-defendant or defendants. I am not fully convinced that this was a case in which the exercise of power of review by the lower Court was justified. It is obvious that, if parties are to be permittted to gather fresh facts and to allege them in order to affect or modify an earlier admission in the record of trial, and to obtain a review upon such basis, this may affect the principle of finality of decision, and also leave the door open for abuses of several kinds. But, on the contrary, it may be that, under the particular circumstances of this case, the learned Judge felt that the interests of justice required interference by way of review, and I agree that too narrow a construction upon the words, "or for any other sufficient cause" in Order 47, rule 1, Civil Procedure Code, will not be in accord with equitable principles. But, in any event, since the matter has become largely academic owing to the efflux of time and the subsequent events that have transpired, I think that it will now be sufficient to determine the rights of parties as follows.

The appeal will be allowed, though I am not committing myself to a finding, that powers of review ought not to be exercised in conceivable circumstances of this character, and the order of remand will be set aside. Further trial of the suit, I may add, has become largely unnecessary because of the final decree since passed; and the efflux of time. The final decree will stand confirmed; but with the modification that as regards costs, which is the only subject-matter in real controversy left at present, the parties will bear their own costs throughout. The defendants will have four months' time from the date of receipt of the records by the Court below, for payment of the balance of the decretal amount. The direction as to costs will govern the Civil Miscellaneous Appeals also.

R.M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Narasram Naraindas *alias* Purushotamdas .. *Appellant**

v.

R. Venkataswami Naidu and others .. *Respondents.*

Madras City Tenants' Protection Act (III of 1922), sections 3 and 9—Tenant erecting superstructure in contravention of the specific prohibition in the lease—If entitled to the benefits of protection and compensation under the Act.

Having regard to the policy and scheme of the Madras City Tenants' Protection Act, the benefits conferred by sections 3 and 9 of the Act could be claimed even by a tenant who has put up a superstructure on the land contrary to the terms of the contract of lease expressly prohibiting erection of any supersturcture on the demised land.

* A.A.O. No. 246 of 1959. 3rd May, 1960.
(13th Vaisakha, 1882, Saka).

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 27th July, 1959 and made in A.S. No. 10 of 1959 preferred against the Decree of the Court of the District Munsif, Coimbatore, dated 8th April, 1958 and passed in O.S. No. 116 of 1957.

T. M. Krishnaswami Ayyar, V. Meenakshisundaram and *T. V. Balakrishnan*, for Appellant.

S. Tyagaraja Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Appeal involves a question of some degree of interest and importance, upon the application of sections 3 and 9 of the Madras City Tenants' Protection Act to the facts of the case. The question, in brief, is whether a tenant who has admittedly contravened the terms of the lease which included a prohibition upon erecting a superstructure, is entitled to claim compensation for the building under section 3 and in consequence, to claim the statutory option under section 9 for purchase of the land. This particular point does not appear to have been decided by authority, so far, though, as I shall presently indicate there are dicta in two Bench decisions of this Court in support of the interpretation that the tenant can so claim rights under the Act, notwithstanding the fact, that, technically speaking, he (the tenant) is a tort-feasor whom the landlord is entitled to restrain by a suitable injunction. The facts necessary for an appreciation of this question, and the single other related question involved in this appeal, are as follows.

The appellant here is the plaintiff in the suit, and the appellant in the first Court, who sued for recovery of possession of leased property. Admittedly, the terms of the lease included a prohibition against the erection of any building thereon by the lessee. But notwithstanding this prohibition, the lessee put up a superstructure on the vacant site originally leased for the purposes of a fuel depot. While the suit was partly under trial, the provisions of the Madras City Tenants' Protection Act were extended to this area (municipal town of Coimbatore) by a Government order, dated 10th February, 1958. Taking advantage of this, the lessees filed I.A. No. 295 of 1958 under section 9 of the Act contending that they had become entitled to purchase the site in question from the plaintiff (landlord). The case of the plaintiff (Appellant) was that this petition was incompetent, because the lessee has deliberately infringed the terms of the lease. Another relevant fact was that the plaintiff (landlord) entered into an agreement to sell the site in question to one Rangaswami Chettiar, as evidenced by Exhibit B-15, dated 28th August, 1956. The appellant further actually executed a sale-deed in favour of the wife of Rangaswami Chettiar, *viz.*, Exhibit A-6, dated 17th December, 1957. The argument was that the provisions of the Madras City Tenants' Protection Act could not apply, as it was an essential pre-requisite for the application of section 9 that the landlord should possess the title. A further argument was advanced that the Act itself was unconstitutional, as offending Article 19 (1) (*f*) and Article 31 of the Constitution of India.

I shall deal very briefly with the subsidiary questions raised, before taking up for discussion the main ground which, as I indicated earlier, is an undecided matter of some degree of interest and importance. As regards the question of constitutrional validity, it is really not necessary to go into this, in view of the Bench decision of the learned Chief Justice and Ganapatia Pillai, J., in *Vajrapuri* v. *N.T. C. Talkie Ltd.*[1] It has been held by the learned Judges in this decision that the Madras City Tenants' Protection Act (Act III of 1922) (as amended by Act XIX of 1955), and particularly sections 3 and 9 thereof, did not infringe Article 31 or Article 19 (1) (*f*) of the Constitution of India. With regard to the other subsidiary ground, I am in enture agreement with the lower appellate Court that all that is necessary is a clarification in this respect, and that the ground is really no bar to the application of the tenants for the recognition by the Court of their option to purchase the

1. (1959) 2 M. L. J. 469 : I.L.R. (1959) Mad. 997 : A.I.R. 1960 Mad. 108.

land under section 9. For, apart from the fact that the transaction of sale in the present case was *pendente lite*, the truth appears to be that no title was conveyed in favour of the third party, by the time the tenants acquired rights under the Madras City Tenants' Protection Act by virtue of the extension of the Act to Coimbatore municipal area. For, it is not in dispute that the sale-deed Exhibit A-6 was not registered, and that, until it is so registered, no title passes to the vendee. The vendee is not a party to the present action, and is not bound by any decision herein. The possible conflict of title between the vendee under the alleged sale, and the tenant who may obtain title by virtue of the present order of Court under section 9, cannot be resolved within the compass of this suit. It will necessarily have to be relegated to some other action, and the parties must be left to work out their remedies. It is true, as contended by Sri T. M. Krishnaswami Iyer, for the appellant, that there seems to be nothing in the scheme of the Act to prevent a landlord from conveying a valid title in the property to another, in anticipation of the application of the Act to a particular area. We are not really further concerned with this matter, and I express no opinion upon the rival claims to title between the intending purchaser who can put forward an agreement to sell in his favour, followed by a sale deed so far unregistered, and the tenant claiming from the original landlord, in pursuance of the order under section 9.

We may now proceed to discuss the substantial ground upon which the appeal has been argued.

It must be conceded that this ground was not placed in proper perspective in the first appellate Court. In that Court, the ground seems to have been expressed in the following form ; since the tenant admittedly infringed the term of the lease which prohibited building, the argument was that he was not such a tenant as is contemplated by the Preamble of the Act, which runs as follows :—

"Whereas it is necessary to give protection to tenants who have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land it is hereby enacted as follows."

The learned Subordinate Judge in appeal rightly negatived this contention based upon this argument founded upon the Preamble. He pointed out that a similar argument had been advanced in *Kannammal* v. *Kanakasabhai*[1], and that it had been negatived. Whatever might be the strict position in law with regard to the propriety of a scrutiny of a preamble to an Act forthe purpose of construction of a statute, I do not think it could be disputed that the statute itself may not be rigidly confined to the scope indicated by the Preamble. The statute does not become bad for that reason. As observed by Curgenven, J., in *Kannammal* v. *Kanakasabhai*[1], aforesaid at page 848 :

"There can be no doubt indeed that many instances could be found of the text of an Act going beyond its Preamble."

Learned counsel for the appellant (Sri T. M. Krishnaswami Ayyar) desires to advance the same argument, founded upon the definite prohibition in the lease which was infringed by the tenant, in another form altogether.

The argument of Sri T. M. Krishnaswami Iyer is this. Under section 108 (*h*) of the Transfer of Property Act, the common law is that the tenant may erect a superstructure on the land, unless expressly prohibited. But if he does so, the landlord has a right to get back possession of the property in the state in which the lessee received it. In other words, the option is for the lessor or the landlord either to take the building on paying compensation, or if he is unwilling to pay compensation, to allow the lessee to remove the building, *I.K. Rowthen* v. *Nazrali Sahib*[2]. Learned counsel would, therefore, interpret section 3 of the Madras City Tenants' Protection Act harmonioulsy with this state of rights under the common law, and not in conflict therewith. According to this interpretation, the words :

1. (1930) 61 M.L.J. 535: I.L.R. 54 Mad. 845.
2. (1903) 14 M.L.J. 25: I.L.R. 27 Mad. 211.

"every tenant shall, on ejectment, be entitled to be paid as compensation the value of any building which may have been erected by him, etc.,"

imply that the erection ought to be at least one permitted by the law and the contract governing the parties, and not expressly prohibited thereby. In other words section 3 was not at all intended to apply to tenants who infringed an express prohibition by building on the land, and such a tenant cannot have an option to purchase the property under section 9. If we turn for a moment to section 12 of the Act, we see that this relates to "any stipulation made by the tenant in writing registered as to the erection of buildings", in other words, this section saves the operation of mutual stipulations under the contract which might form the conditions under which the superstructure could be erected. This matter has been referred to by Ganapatia Pillai, J., in *Vajrapuri* v. *N. T. C. Talkie Ltd.*[1], already referred to. It was therein observed that the learned Judges were not concerned, in that particular case, with the instance of an erection of buildings contrary to the stipulations contained in the written contract. But in the present case, we have an instance of a superstructure erected contrary to the contract, not in the sense (referred to by Ganapatia Pillai, J.) that the contract deed contained certain stipulations as to building, which were in fact exceeded or contravened, but in the more absolute sense that, according to the contract, the tenant could not build on the land at all. But, is there anything either in the scheme of the Act, or in the wording of section 3 itself, to lend support to the interpretation of the learned counsel for the appellant that such a tenant could not claim compensation for the superstructure under section 3.

Their Lordships of the Supreme Court have explicitly laid dawn in *Sri Ramnarayan* v. *State of Bombay*[2], that :

"If the language of the eneactment is clear and unambiguous, it would not be legitimate for the Court to add any words thereto and evolve therefrom any sense which may be said to carry out the supposed intentions of the Legislature."

If the Legislature had intended that it was not every 'tenant' as defined in section 2(4) of the Act, who could claim compensation for the superstructure, but only a tenant who was not infringing an express term of the contract by so building, the Legislature ought to have used those words of restriction or qualification in section 3 itself. The Legislature has not used those words. Again, the actual words used are plain, unqualified and unambiguous. The rule of construction is that Courts are not at liberty to add any words thereto, in order to give effect to the suppcsed intentions of the Legislature. It is true that we might suppose that a special enactment of this character does not make inroads into the prior common law or the law of property except as specifically stated in the Act. But, this will not enable us to assume that there is a restriction or qualification which might be more in consonance with the general background of property law, which has to be read into the section as words of qualification, when they are not there. I may here point out that, even apart from the commencing words of section 12:

"Nothing in any contract made by a tenant shall take away or limit his rights under this Act"

we have also section 13 which specifically purports to restrict the application of the Transfer of Property Act, to the extent to which it is necessary to give effect to the provisions of the Madras City Tenants' Protection Act.

Therefore, I am compelled to assume that section 3 would apply even where a superstructure is built without authorisation, or contrary to contract, by the concerned tenant. If section 3 would apply, section 9 applies as a logical consequence, and such a tenant is entitled to re-purchase the property. I am fortified in this by two observations, both occurring in Bench decisions of this Court. In *Kannammal* v. *Kanakasabhai*[3], Bashyam Ayyangar, J., specifically stated the law to be that :

"Even if the tenant had erected the building without or against the consent of the landlord the Act would appear to permit the former to acquire the land through its instrumentality."

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1. (1959) 2 M L J. 469 : I.L.R. (1959) Mad. 997 : A.I.R. 1960 Mad. 108.
2. A.I.R. 1959 S.C. 457 at 470.
3. (1930) 61 M.L.J. 535: I.L.R. 54 Mad. 845.

Similarly, in the Bench decision in *Vajrapuri* v. *N. T. C. Talkie Ltd.*,[1] Ganapatia Pillai, J., reiterates this interpretation in almost identical language (page 111, paragraph 6).

Even apart from the question of interpretation, there is material in the present case to show that the landlord must have been aware of the building operations conducted by the tenant, and that he did not then choose to inverven̊e or to claim the prohibition. The first Court actually held that the landlord consented to the building. We need not go so far, but certainly there seems to have been some degree of acquiescence or standing by. But, however this might be, I think that the tenants are entitled to succeed upon the question of interpretation itself, as I have earlier indicated.

In result, therefore, the appeal fails, and is dismissed with costs. Leave granted.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Tirukuthalanathaswami Devasthanam by Executive Officer, Courtallam .. *Petitioner**

v.

The Township Committee, by Executive Officer, T. Shanmughasundaram .. *Respondent.*

Madras District Municipalities Act (V of 1920), sections 78 to 80—Rules in Schedule IV (made applicable to Courtallam Township by Courtallam Township Act (1954)—Levy of property tax—Retrospective levy is illegal—Section 83 (a)—Place set apart for public worship—Nandavanam exclusively for the temple—Exemption from property tax.

Interpretation of Statutes—Retrospective operation—Tests.

Courtallam was constituted as a township under the Courtallam Township Act, 1954 and the Act came into force from 1st October, 1955. Under section 3 of the Act the Courtallam Township Committee was constituted for the purpose of administering the municipal affairs of the township. Under section 4 the provisions of the District Municipalities Act were made applicable to the township. The Town-hip Committee resolved on 6th December, 1955, to levy taxes under section 78 of the District Municipalities Act and published the same on 23rd December, 1955. After hearing the representations the Township Committee acting under section 80 of the District Municipalities Act resolved to levy the taxes and the taxes were made payable from 1st October, 1955. This resolution was published on 19th March, 1956, specifying the rate, etc., and that the taxes were to be paid from 1st October, 1955. The assessment books were then prepared for the first time. Demand notices for the payment of taxes inclusive of a library cess were issued on 26th August, 1956.

Held: there is nothing in the provisions contained in sections 78, 79, and 80 of the Madras District Municipalities Act expressly authorising the Courtallam Township Committee to levy any tax so as to have retrospective operation.

Prima facie, section 78 of the Act can have only prospective operation. Sub-section (3) makes it mandatory for the Municipal Council to specify the date from which the tax would be levied. Section 80 of the Act conforms to section 78 as the resolution and the consequential publication are as a result of the resolution under section 78. Further the rules contained in Schedule IV which are deemed to be part of the enactment can be reasonably referred to as interpreting the object of the Act Rules 8 and 14 (2) for instance specifically provide for a limited retrospective operation. That would imply that in regard to other matters there should be no retrospective operation of the taxes. Rule 15 states that the first payment of tax shall be made within 30 days of the date specified in Rule 14. Rule 14 (1) states that the assessments would have effect only from the date specified in the notification. That the date specified in the resolution under sections 78 and 80 should only be a future date is clear from the provisions of Rule 15. That rule directs that the tax assessed should be paid within 30 days of the date specified in section 80. The assessment was finalised only by 26th August, 1956. The rate-payer would not have known before that date what he had to pay. If Rule 15 were to be complied with according to its tenor it would mean that the tax was payable within 30 days from 1st October, 1955, at a time when the tax itself had not been levied or ascertained.

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1. (1959) 2 M. L. J. 469: I.L.R. (1959) Mad. 997: A.I.R. 1960 Mad. 108. 17th October, 1959.
* W.P. Nos. 1467 and 1489 of 1956, etc. (25th Asvina, 1881—Saka.)

It is not possible to assume that the Legislature would have intended such a result. Sections 78 and 80 of the Act should therefore be held to authorise only the fixing a future date from which any tax has to be paid.

The resolutions of the Township Committee, dated 6th December, 1955 and 8th February, 1956, which levied the tax as and from 1st October, 1955, were not authorised, but contrary to the provisions of sections 78 and 80 of the Act and should be held to be illegal.

The demand notice in so far as it included the library cess which was not authorised by the statute should be held to be illegal and that by itself is enough to invalidate the demand.

The general rule is that a statute except when it relates to procedural matters could not be construed as having a retrospective effect unless so expressed by the very terms thereof or by necessary implication. This rule will apply with greater force in regard to taxation or fiscal statutes.

Section 83 (*a*) of the Act exempts from property tax places set apart for public worship and either actually so used or used for no other purpose. Where the flowers grown in a Nandavanam which is a necessary adjunct to a temple are used for the worship of the temple the petitioners would be exempt from paying the property tax (even if properly levied) in respect of it.

Maxwell on "Interpretation of Statutes" referred.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the issue of the demand notice, dated 31st August, 1956 and 27th September, 1956, in assessment No. 128 for Rs. 165-15-3 and No. 56 for Rs. 159-13-6 respectively under the Madras District Municipalities Act, filed herewith, and to quash the said proceedings. (Prayer amended as per order, dated 12th March, 1957, in C.M.P. No. 1806 of 1957).

T. M. Krishnaswami Ayyar, A. Balasubramaniam, R. Ramamurthi Ayyar, S. V. Rama Ayyangar, T. S. Santhanam, S. Sethuratnam, T. R. Sundaram, S. K. Ahmed Meeran and *M. D. K. Vallinayakam*, for Petitioners.

K. Veeraswami (Government Pleader), for Respondent in all the Petitions.

The Order of the Court was made by

Ramachandra Iyer, J.—[W. P. No. 1467 of 1956]. This is a petition under Article 226 of the Constitution for the issue of a writ of *certiorari* or other appropriate writ to call for the records connected with the assessment of property tax in the Courtallam Township and the demand notice, dated 31st August, 1956, and to quash the same.

The petitioner is Sri Tirukuthalanathaswami Devasthanam at Courtallam, and it owns a number of buildings, sites, and lands within the limits of the Courtallam Township. Originally, Courtallam came within the purview of the Madras Village Panchayats Act (Act X of 1950), and its affairs were managed by a Panchayat Board constituted under that Act. In 1954 Courtallam was constituted a township and provision made for its administration and governance. Under section 2 of the Act, the area, which was comprised within the jurisdiction of the erstwhile Courtallam Panchayat, was declared to be within the Courtallam Township as and from the appointed day to be declared by notification by the Government. By G.O. No. 1323, L.A., dated 29th October, 1953, the State Government declared that the Act would come into force in Courtallam from 1st October, 1955. By the same notification, the Government constituted under section 3 of the Act, as and from that date a Committee to be called Courtallam Township Committee for the purpose of administering the municipal affairs of the newely constituted township. The notification also appointed the members of the Committee. Section 4 of the Act enables the State Government, by notification, to direct that any of the provisions of the Madras District Municipalities Act, 1920 (which shall hereafter for brevity be referred to as the Act) or any of the rules made thereunder, or any other enactment for the time being in force elsewhere in the State of Madras, shall apply to the Courtallam Township to such extent and subject to such modification, additions and restrictions as may be specified in the notification. G.O. 1323, L.A., dated 29th October, 1953, referred to above also included a notification under section 4. As the present case is concerned only with the levy of property tax, it would be suffi-

cient to notice that sections 78(1) and (3) and 80 to 91 and Schedule IV, excepting rules 43 (1) (*a*) and 43 (2) of the Act, were made applicable to the township. Section 4 (2) (*a*) of the Courtallam Township Act enables the Township Committee to levy all or any of the taxes and fees which may be levied by virtue of the the provisions of the District Municipalities or other Acts which applied to the township. Section 4 (3) declares that the notification made by the State Government under sub-section (1) shall have effect as if enacted in the Act itself. The result is that the provisions of the Madras District Municipalities Act, referred to above, should be deemed to be incorporated and form part of the Courtallam Township Act.

The Township Committee resolved on 6th December, 1955, to levy taxes under section 78 of the Madras District Municipalities Act, and published the same on 23rd December, 1955. The resolution was to this effect :

"The Township Committee, Courtallam, resolved to levy the following taxes with effect from 1st October, 1955. Objections and suggestions in this regard, if any received from the public within one month from the date of publication of notification, will be taken up for consideration."

The various taxes proposed to be levied and the rates at which such taxes were to be collected were then set out. They related to property, profession, carriage and animals and carts. The first item which related to a tax on property under sub-sections (1), (3) and (4) of section 81 of the District Municipalities Act comprised (1) tax for general purposes, (2) water and drainage tax and (3) lighting tax and scavenging tax at specified rates. On 8th February, 1955, after hearing the representations from those who showed cause, the Township Committee, acting under section 80 of the Act, resolved to levy the taxes aforesaid. The rates originally proposed were, however, reduced and certain exemptions were also granted. But the taxes were made payable as and from 1st October, 1955. This resolution was published on 19th March, 1956, specifying the rate and the period for which the taxes and fees were to be levied, and also specifying that they were to be paid from 1st October, 1955, the date of the constitution of the Township. The assessment books were then prepared for the first time in the prescribed form showing the persons, the property liable to taxation and the detailed particulars relating to the assessment. Notices were duly published. Revision petitions were filed by some rate-payers under rule 9 of the Schedule IV in respect of the first and succeeding half years. Some of them were rejected and some others are said to be still pending. Demand notices for the payment of the taxes were issued on 26th August, 1956. Although the resolutions under sections 78 and 80 of the Act then given did not warrant it, the demand notices included library cess payable under Act XXIV of 1948. It is the legality of the demand notices and the antecedent assessments that are challenged in this and the connected writ petitions.

The contention on the part of the petitioner was that the levy and assessment on property were contrary to the provisions of the statute, and that, therefore, they were illegal. The illegality pointed out was that the levy of the taxes, being made retrospective, that is, as and from 1st October, 1955, some months anterior to the resolutions under sections 78 and 80 of the Act, would be contrary to the provisions of the Act and beyond the powers of the Township Committee. The learned Government Pleader, appearing for the Township Committee, on the other hand, contended that the provisions of the Act authorised a retrospective levy, and that even if it were otherwise, as the levy was complete before the end of the first half year after the coming into existence of the Township, it should not be considered a retrospective one.

It would be convenient, at this stage, to set out the relevant provisions of the Act, which have to be considered in appreciating the contentions advanced.

"*Section* 78.—(1) Every Municipal Council may levy.

(*a*) Property-tax. . . . . .

(*b*) . . . .

" (3) Any resolution of a municipal council determining to levy a tax shall specify the rate at which any such tax shall be levied and the date from which it shall be levied.

Provided that before passing a resolution imposing a tax for the first time or increasing the rate of an existing tax, the council shall publish a notice in at last one vernacular newspaper, on the notice board of the municipal office and in such other places within municipal limits as may be specified by the council and by beat of drum of its intention, fix a reasonable period not being less than one month for submission of objections and consider the objections if any, received within the period specified :

Provided also . . . .

Provided also that, where any resolution under this section has taken effect for a particular year, no proposals to alter the rates or date fixed in such resolution so far as that year is concerned shall be taken into consideration by the council ".

" *Section* 80.—When a municipal council shall have determined subject to the provisions of sections 78 and 79 to levy any tax for the first time or at a new rate, the executive authority shall forthwith publish a notification in the District Gazette and by beat of drum specifying the rate at which, the date from which and the period of levy, if any, for which such tax shall be levied."

Schedule IV of the Act contains the Taxation and Finance Rules framed under sections 303 and 304. Section 303 invests the State Government with power to make rules to carry out all or any of the purposes of the Act, and section 304 provides for such rules being published and on such publication having effect as if enacted in the Act. Schedule IV, Rules 2 to 5 apply to all taxes and relate to the preparation and maintenance of assessment books, the determination of tax by the executive authority and the amendment of the assessment books, etc. Rules 6 to 15 relate to property tax. Rule 6 provides that the value of any land or building for purposes of property tax shall be determined by the executive authority. Rule 7 obliges the executive authority to enter the annual or capital value of all lands and buildings determined by him and the tax payable thereon in the assessment books to be kept for the purpose at the municipal office. Rule 8 provides for revision of assessment once in five years. It also provides for the amendment of assessment books at any time, *inter alia* altering the valuation of any property. Such assessment, when made, is deemed to take effect from the first day of the half-year in which it is made. Rule 9 prescribes that, after the completion of assessment books, the executive authority shall give public notice, stating that revision petitions will be considered within a period of 60 days therefrom. The other rules are :

" *Rule* 13.—Immediately after the disposal of a revision petition, the executive authority shall inform the petitioner or his authorised agent either orally or in writing, of the orders passed thereon, shall direct him to pay the amount fixed on revision within fifteen days after the date of receipt of such intimation, or, if the amount is not yet due within fifteen days from the date on which it becomes due, and shall, if necessary, cause the assessment books to be corrected

Rule 14 (1).—On the establishment of a municipality, assessments shall have effect from the date specified in the notification under section 80.

Rule 15.—The first payment of tax shall, save as provided in rule 13, be made within thirty days of the date or day specified in rule 13."

As per resolution referred to above, the assessment, and the demand covered a period from 1st October, 1955, it has to be considered whether the provisions set out above authorised such a course.

There is nothing in the aforesaid provisions, expressly authorising the Municipality, in the instant case, Township Committee, to levy any tax so as to have retrospective operation.

The first question to be considered then is whether a necessary intendment to authorise a retrospective levy could be informed and whether the provisions of the statute are sufficient to warrant such an implication and levy.

The general rule is that a statute, except when it relates to procedural matters, could not be construed as having a retrospective effect, unless so expressed by the very terms thereof, or by necessary implication. This rule will apply with greater force in regard to taxation, or fiscal statutes. A subject cannot be taxed except under law. Enactments imposing pecuniary burdens on the subject should be strictly construed in favour of the tax-payer, and, unless he is brought within it, he could not be made liable. As taxation does not exist apart from a law authorising the tax no liability could be enforced by inference or analogy. It is well settled

that an intention to impose a tax must be shown by clear and unambiguous language, and in the absence of plain declaration by the legislature, a tax should not be considered to have been imposed.

In Maxwell on "Interpretation of Statutes", 10th edition, at page 288, it is stated :

" Statutes which impose pecuniary burdens also, are subject to the same rule of strict construction. It is well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation ".

In *Canadian Eagle Oil Co. Ltd.* v. *The King*[1], Lord Simon, L.C., observed thus :

" But the opinions delivered by Lord Macnaghten and Lord Devey in that well-known case (*London County Council* v. *Attorney-General*)[2] proceed upon a meticulous construction of those particular provisions and not upon the supposition of any general principle underlying them, and remaining unexpressed. No such supposition is legitimate. In the words of the late Rowlatt, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, ' in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' (*Cape Brandy Syndicate* v. *Inland Revenue Commissioners*)."[3]

The principles would apply with equal force to the municipal taxation, firstly because it is a piece of delegated legislation and secondly it is a recurring tax liability.

In Maxwell on "Interpretation of Statutes", 10th edition, at page 204, it is stated :

" Although there is no positive rule against a retrospective rate, enactments which authorise the imposition of rates and similar burdens on the inhabitants of a locality have been repeatedly held not to authorise, without express words, a retrospective charge on the ground of the injustice of throwing on one set of persons a burden which ought to have been borne by another at a former period."

Bradford Union v. *Clerk of the Peace of Wilts*[4], related to a case of a rate levied on a county for the maintenance of a lunatic. Cockburn, C.J., considering whether on the terms of a statute it was open to the Justices to make a retrospective order for the payment of costs of maintenance, observed :

" *Prima facie*, this language is prospective, there is nothing which treats of past maintenance, and we start with the proposition that in all such cases the rate must be prospective and not retrospective, so that the expenses shall fall on the rate-payers who are rate-payers at the moment of the expenses being incurred ; whereas by doing what in effect would amount to the same thing as making a retrospective rate, the expenses of past years are made to fall on the rate-payers of the present year. That being a principle adopted long ago and long acted on, whenever the legislature has thought it expedient to authorize the making of retrospective rates or orders, it has fixed the period as to which the rate or order may be retrospectively made."

The observations of the learned Chief Justice would apply with particular emphasis in a case of property tax by a municipality. By way of example, let us suppose that a property in a municipality is sold by the owner and, after the sale, the authority levies a property tax retrospectively operating from a time long anterior to the date of sale. The tax will be a charge on the property: the purchaser who bought when there was no levy would be obliged to pay for a period when his vendor was the owner and would be left with the doubtful remedy of proceeding personally against his vendor for contribution. Principle and convenience alike point to the fact that a taxing statute should be only prospective : it is *prima facie* construed, as not having a retrospective operation. That does not, however, mean that a legislature cannot impose a retrospective pecuniary liability: the legislature can also legislate vesting such power in a local or municipal authority within the limits in which there can be a delegated legislation. Whether the legislature has so done, is a matter of interpretation. The rule of interpretaion is stated by Lord Halsbury, L.C., in *Tennant* v. *Smith*[5], thus :

" In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this that inasmuch as you have no right to assume that

1. L.R. (1946) A.C. 119, 139.
2. L.R. (1901) A.C. 26.
3. L.R. (1921) 1 K.B. 64, 71.
4. L.R. (1868) 3 Q.B. 604, 616.
5. L.R. (1892) A.C. 150, 154.

there is any governing object which taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

Cases, therefore, under the taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

It has, therefore, to be seen whether the words of sections 78 and 80 of the Act, which authorise the levy of the taxes set out in the former section, are sufficiently expressed to give a power of retrospective levy. *Prima facie* section 78 can have only prospective operation. Sub-section (3) makes it mandatory for the municipal council to specify the date from which the tax would be levied. Section 80 conforms to section 78, as the resolution and the consequential publication are as a result of the resolution under section 78. Further the rules contained in Schedule IV, which are deemed to be part of the enactment, can be reasonably referred to as interpreting the object of the Act. Rules 8 and 14 (2) for instance specifically provide for a limited retrospective operation. That would imply that in regard to other matters there should be no retrospective operation of the taxes. Rule 15, to which we have made reference, states that the first payment of tax shall be made within 30 days of the date specified in rule 14. Rules 13 and 14 deal with two classes of cases: (1) the first levy, and (2) levy on the basis of a general revision. In the present case we are concerned only with the former. Rule 14 (1), to which reference has been made already, states that the assessments would have effect only from the date specified in the notification. It may be and it was so contended before us that on the terms of sections 78 and 80 there would be no express ban on the municipality fixing some day anterior to the notification as the date from which tax would be payable: but that is not enough. That the date specified in the resolution under sections 78 and 80 should be only a future date, is clear from the provisions of rule 15. That directs that the tax assessed should be paid within 30 days of the date specified in section 80. If the date specified in section 80 is anterior to the date of the resolution itself, would it be possible for any tax-payer to pay within 30 days thereof when even none of the necessary preliminaries contemplated under the Act for the levy and assessment could have been completed, the quantum of tax itself would not have been known. This case itself illustrates the difficulty. The assessment was finalised only by 26th August, 1956. The rate-payer would not have known before that date what he had to pay. If rule 15 were to be complied with according to its tenor, it would mean that the tax was payable within 30 days from 1st October, 1955, at a time when the tax itself had not been levied, ascertained or assessed. It is not possible to assume that the legislature would have intended such a result. Sections 78 and 80 should, therefore, be held to authorise only the fixing of a future date from which any tax has to be paid.

The levy of all or any of the taxes mentioned in section 78 is made optional to the municipality. If a municipality had, therefore, omitted to levy in earlier years it should be held that they exercised the option of not levying the tax for those years. There could, therefore, be no intention on the part of the legislature to invest the municipality with power of retrospective levy. In *Bates* v. *The Municipal Commissioner, Bellary*[1], legality of a professional tax which was imposed for the first time was challenged. The tax was levied from 1st May, 1871, while the sanction of the Governor-in-Council was obtained only on 4th July, 1871. It was held that there was no legal authority whatever for the imposition of the tax at the commencement of the year. In *Sir Gulam Md. Ali Sahib Bahadur* v. *Corporation of Madras*[2], a question arose whether it was open to the Corporation to levy professional tax retrospectively. The learned Judges held that the tax being based on assessment should not be held to be due till it was so assessed, and that there was no power of backward assessment, and that the careful prohibition of retrospective assessment in the revision of property tax would indicate that there was no power to levy retrospectively. It is true that the Courtallam Township could not have taken steps earlier than it did to levy a

1. (1873) 7 M.H.C.R. 249. 2. (1929) 57 M.L.J. 536.

tax from the date when it came into existence. But the power of taxation conferred on it are only those of a municipal council under sections 78 and 80, and if those provisions did not confer a right to levy taxes retrospectively, it should be held that the Township Committee had no such power. There is nothing in sections 78 and 80 expressly justifying a retrospective levy of the tax, and we find that there is nothing in those provisions to authorise or justify backward assessment. We are, therefore, of the opinion that the resolutions of the respondent Committee, dated 6th December, 1955 and 8th February, 1956 which levied the tax as and from 1st October, 1955, were not authorised, but contrary to the provisions of sections 78 and 80 of the Act, and should be held to be illegal.

The learned Government Pleader contended that, under the provisions of sections 86 to 90, the property tax would be a half-yearly tax, a half-year being taken as a unit, and that as the levy was complete in the present case by 8th February, 1955, within the first half-year after the Township came into existence, there was no retrospective levy as such, but a levy for the then current half-year. According to him, the levy was complete by 6th February, 1955, the subsequent assessment being independent of the levy which though necessary for ascertaining the quantum of tax would have no relevance to the charge or liability of the tax-payer. But the question is not so much as to whether the levy was completed within a particular half-year but whether the resolutions of the Township Committee under sections 78 and 80 are valid. We have already held that the resolutions could under the law only fix a future date from which the tax proposed could be levied. The resolutions being invalid, the question of completion of levy within the half-year cannot arise. Rules 8 and 14 (2) of Schedule IV specifically provide that the amendment or a general revision of tax would date back to the beginning of half-year in which it was made. That would imply that in all other cases, the present case being under Rule 14 (1) no tax could be levied even from the beginning of the half-year in which it was levied. A similar-attempt was made in the case reported in *C. E. Bates* v. *The Municipal Commissioner, Bellary*[1], where a tax was sought to be levied from a date anterior to the sanction thereof by the Governor-in-Council. The learned Judges observed:

> "The sanctions as to notice enforce the construction that there is only one legal period of imposition of the tax, and at that period there was no tax legally in existence. We answer, therefore, that the levy from the plaintiff was illegal".

The learned Government Pleader relied on the decision in *Municipal Council, Anantapur* v. *Vasudeva Rao*[2]. There, proceedings were taken by the municipal council to enhance the rate of tax from 1st April, 1928. The resolution was passed in January, 1928 and the same confirmed on 17th March, 1928. The notification under section 80 was, however, made only in April, 1928. That was in the next fiscal year. The validity of the tax was sought to be questioned. The learned Judges upheld the same on the ground that the tax was assessed by the resolution, and that the publication in the District Gazette was not vital for its validity. It must be noticed that the levy in that case was for enhanced tax and the terms of rules 8 and 14 specifically enabled such enhanced tax to become operative from the beginning of the half-year, in which the resolution was passed. The learned Government Pleader then called in aid the *Third Proviso* to section 78 as indicating a power to tax retrospectively. But, in our opinion, that *Proviso* would rather indicate that the date to be fixed under section 78 should only be a future one, and not an anterior one as it contemplated a levy not coming into force and expressly negatived a right of amendment of a resolution during the particular year in which the resolution had taken effect.

It was then contended that the resolution relating to the levy of the assessment in pursuance thereof should be deemed to be severable, comprising two periods, one, the first half-year, and the other, the future half-years, and that while the resolution relating to the former period would be invalid it could be confined so as to validly

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1. (1873) 7 M.H.C.R. 249. 250. 2. 61 M.L.J. 642 : A.I.R. 1931 Mad. 808.

operate in respect of the latter. Reliance was placed, in this connection, on *Adiappa Chettiar* v. *Taluk Board, Devakottai*[1], and on certain observations made by one of us in *V. S. T. T. H. Madarasa* v. *Melapalayam Municipality*[2], to support the contention that where part of assessment was severable, the invalid part could be separated from the valid one. We are of opinion that there is nothing in the resolution to warrant such a distinction. To read them in the way contended for, would be to read it differently from what it purports to be. There being no valid resolution to support the assessments there could be no rated demand of the tax.

The result is, no doubt, unfortunate. The-tax payer is relieved of paying from 1st October, 1955, even the tax which he paid to the Panchayat Board, as the Panchayat had beeen abolished : he cannot be compelled to pay the Township Committee from the date when the Panchayat Board ceased to exist, as there is no valid levy. That result is by reason of the fact that the Courtallam Township Act failed to make a transitory provision, authorising the levy of tax till the Township Committee lawfully levied the same under sections 78 and 80. Section 368 (1) of the Madras District Municipalities Act contains provisions to apply to new and reconstituted municipal councils ; it authorises the Special Officer to exercise the powers to discharge duties and perform the functions of a municipal council until the council has been constituted. That provision has been excluded by the notification under the Courtallam Township Act. Even otherwise, we are of opinion that it was for the legislature, if it thought fit, to have conferred express powers on the Township Committee to levy taxes as and from 1st October, 1955. This, however, was not done. The Township Committee could act only under the powers vested in it under sections 78 and 80 and Schedule IV of the Act and levy the tax from a future date in accordance therewith. This too was not done.

Section 5 of the Township Act, which purports to transfer all property, rights and liabilities of the Courtallam Panchayat Board to the Township, cannot be held to authorise the levy of taxes which, as we pointed out, should be specifically conferred by the statute. A power to tax cannot be deemed to be a right enjoyed by the former Panchayat and later transferred by virtue of section 5 of the Township Act. To hold otherwise, would lead to the result that the Township Committee would have two distinct authorities to tax, one inherited from the Panchayat Board by virtue of section 5 and the other conferred upon it by section 4.

Apart from the invalidity of the assessment proceedings, complaint is made that, in the demand notices in addition to the property tax, library cess is included. Act XXIV of 1948, which authorises levy of library cess, could only apply to an area covered by municipal council. *Vide* Section 12 (2) (*b*). Therefore the Township Committee would have no right to collect or include in its demand a library cess. The demand notice, in so far as it included the library cess which was not authorised by the statute, should be held to be illegal. That by itself is enough to invalidate the demand. We have held that the demand of property tax was also invalid.

No other point was urged on behalf of the petitioner in regard to the invalidity of the levy and assessment of property tax.

Rule *nisi* is, therefore, made absolute.

[*W.P. No.* 1489 *of* 1956.]—This petition relates to the assessment of a *nandavanam* owned by Sri Thirukuthalaswami Devasthanam. Flowers grown in the *nandavanam* are exclusively used for the purpose of the temple. Section 83 (*a*) of the Madras District Municipalities Act exempts from property tax places set apart for public worship and either actually so used or used for no other purpose. In *Municipal Council of Tirupati* v. *Sree Mahant Prayag*[3], certain buildings were used by Tirupati Devasthanam for stabling the Devasthanam coaches and horses which were employed in carrying drums in temple

1. (1938) 2 M.L.J. 589.
2. (1959) 2 M.L.J. 92.
3. (1914) 27 M.L.J. 231.

processions or allowed for use of respectable pilgrims to whom such honour was shown by the Mahant. It was held that the buildings were exempt from taxes, as the use was for religious purposes. That decision was approved in *Municipal Council, Palni* v. *Sri Dhandayuthapani Devasthanam*[1]. That was a case where a power-house was erected by the Palni Devasthanam at the foot of the hill. The power house supplied energy not merely to the hill and the temple but also to certain shops and a hotel on the hill, for consideration yielding a profit. The learned Chief Justice, delivering the judgment of the Bench, held that the decision in the *Municipal Council of Tirupati* v. *Sree Mahant Prayag*[2], was not open to criticism, because the buildings were used for purposes connected with worship in a public place, but that the principle of that decision was inapplicable to the case before him, as the power-house was being used for commercial, as well as religious purposes. A *nandavanam* is a necessary adjunct to a temple. The flowers grown there are used for the worship in the temple. In the present case it is stated that the flowers grown in the *nandavanam* are exclusively used for the temple. It would, therefore, follow that the petitioner would be exempt from paying the property tax (even if properly levied) by virtue of section 83 (*a*) of the Act.

Rule *nisi* is, therefore, made absolute.

W.P. Nos. 126 *to* 134, 278, 689 *and* 690 *of* 1957 ; 191 *to* 196 *of* 1958 ; 1227 *and* 1228 *of* 1956 *and* 708 *to* 710 *of* 1958.—Following our decision in W.P. No. 1467 of 1956, rule *nisi* has to be made absolute. We may, however, state that the various other objections which were taken in respect of legality of the levy of the property tax in these cases have not been pressed before us.

Rule *nisi* is made absolute.

No order as to costs in the above petitions.

V.S. ——— *Rule nisi made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

L. N. Mukerjee and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 177 and 180—Scope and interpretation of—Charge of criminal conspiracy and offences committed in pursuance thereof—Conspiracy committed in Calcutta—Other offences committed in Madras—Jurisdiction of Court of Session in Madras to try offence of conspiracy.

The petitioners were committed for trial to the Court of Session, Madras, for offences under section 120-B read with section 420, Indian Penal Code, section 467, section 420, read with section 118 and section 420 read with section 511, section 467, read with section 109, Indian Penal Code and section 420, read with section 109, Indian Penal Code. The petitioners sought to quash the commitment on the ground that the Court of Session, Madras, had no jurisdiction to try the offence of conspiracy under section 120-B, as that offence was committed only in Calcutta outside the jurisdiction of the Court of Sessions, Madras, though the other offences in pursuance of the conspiracy were committed within the jurisdiction of the Court of Session, Madras.

Section 177, Criminal Procedure Code, which lays down the ordinary rule as to jurisdiction, adopts the English Common Law rule as to venue, which is a broad and fundamental principle. But the offence of criminal conspiracy has always been recognised as an exception with regard to the question of venue. Conspiracy may be tried not only in the place were the conspirators agreed to do the wrongful act which is the object of the conspiracy but also in any place where one of the criminal acts in pursuance of the conspiracy is committed.

Section 180 contemplates two offences of which one category is designated as " the first mentioned offence ". Where an act which is an offence by reason of its relation to any other act which is also an offence is committed, a charge of the " first-mentioned offence " may be tried by the Court within the local limits of whose jurisdiction either act was done.

Where the offence of criminal conspiracy occurs, which is an offence solely by reason of its relation to other act which is an offence, and an offence in pursuance of criminal conspiracy is also committed, the offence of criminal conspiracy which is " the first mentioned offence " within the meaning of section 180, Criminal Procedure Code, may be tried at Calcutta where the offence itself occurred or at Madras where the offence or offences in pursuance of the conspiracy occurred. The fact that

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1. (1940) 2 M.L.J. 897.
2. (1914) 27 M.L.J. 231.

* Crl. M.P. Nos. 246 and 274 of 1960.

14th April, 1960.
(25th Chaitra, 1882, Saka).

conspiracy is a substantive offence in itself would not take the offence of criminal conspiracy out of the ambit of section 180, Criminal Procedure Code. Since the "first mentioned offence" can refer to the charge of criminal conspiracy alone, the Court which has jurisdiction to try the offence committed in pursuance of it, can also try the offender or offenders upon the charge of conspiracy.

Bachan Pandey v. *The State*, A.I.R. 1957 All. 130, approved.

Sachithanandam v. *Sowmya Gopala Ayyangar*, (1929) 57 M.L.J. 518: I.L.R. 52 Mad. 991 : A.I.R. 1929 Mad. 839, *Dani and others*, In re A.I.R. 1936 Mad. 317 and *Emperor* v. *Parsumal Geermul*, A.I.R. 1938 Sind 108, dissented from.

Hanumantha Rao, In re, (1933) 66 M.L.J. 193 : I.L.R. 57 Mad. 545 and *Babulal Chaukani* v. *Emperor*, (1938) 1 M.L.J. 647 : L.R. 65 I.A. 158 : 1938 All. L.J. 382 (P.C.), referred to.

Jiban Banerjee v. *State*, A.I.R. 1959 Cal. 500 (F.B.), distinguished and explained.

Banwarilal v. *Union of India*, A.I.R. 1959 Ker. 311, relied on.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the order of committal of the Seventh Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras in C.C. No. 8479 of 1959.

G. Gopalaswami, A. S. Sivakaminathan, for Petitioners.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

When the petition came on for hearing before Somasundaram, J., in the first instance the following order of reference was made.

Somasundaram, J.—The petitioners have been committed to the Court of Sessions, Madras, for offences under section 120-B read with section 420, section 467, section 420 read with section 118 and section 420 read with section 511, section 467 read with section 109, Indian Penal Code and section 420 read with section 109, Indian Penal Code. The petitioners seek to quash the commitment on the ground that the Court of Session, Madras, has no jurisdiction to try the offence of conspiracy as the offence of conspiracy was committed only in Calcutta. It is contended that though the other offences in pursuance of the conspiracy may be committed within the jurisdiction of the Court of Session, Madras, and they may be tried at Madras, still, as the offence of conspiracy was committed outside Madras, and in another State, it cannot be tried in Madras. There are two decisions of our High Court one in *Sachidanandam* v. *Sowmya Gopala Ayyangar*[1] by Odgers, J., and the other in *Dani and others* In re[2] by K. S. Menon, J., which support that contention.

A Full Bench of the Calcutta High Court in *Jiban Banerjee* v. *State*[3], also supports that view. But there is a judgment of a single Judge of the Allahabad High Court in *Bachan Pande* v. *The State*[4] which differs from the view taken in the above two Madras decisions. I am inclined to agree with the view taken by the Allahabad High Court. It seems to me that under the provisions of sections 235 and 239, Criminal Procedure Code, persons accused of different offences, or several offences, if they were committed in the course of the same transaction, then they can all be tried in any place which has jurisdiction over one of such offences. As I do not agree with the view taken by Odgers, J., in *Sachidanandam* v. *Sowmya Gopala Ayyangar*[1] and by K. S. Menon, J., in *Dani and others*, In re[2] and as the question is one of importance, and as it is likely to arise frequently, it is better that an authoritative decision is given by a Bench of this Court.

The papers will therefore be placed before my Lord the Chief Justice for orders to post before a Bench.

In pursuance of the above order of reference the petition came on for hearing before a Bench consisting of Ramaswami and Anantanarayanan, JJ.

G. Gopalaswami and *Miss Lakshmi Panikker*, for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

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1. (1929) 57 M.L.J. 518 : I.L.R. 52 Mad. 991 : A.I.R. 1929 Mad. 839.
2. A.I.R. 1936 Mad. 317.
3. A.I.R. 1959 Cal. 500 (F.B.)
4. A.I.R. 1957 All. 130.

The Order of the Court was made by

Anantanarayanan, J.—These petitions have come up before us upon a reference by our learned brother Somasundaram, J. The facts are that the petitioners were committed for trial to the Court of Session, Madras, for offences under section 120-B read with section 420, section 467, section 420 read with section 118 and section 420 read with section 511, section 467 read with section 109, Indian Penal Code, and section 420 read with section 109, Indian Penal Code. The petitioners sought to quash the relevant commitments on the ground that the Court of Session, Madras, had no jurisdiction to try the offence of conspiracy, as the offence of conspiracy was committed only in Calcutta, though it is not in dispute that the other offences in pursuance of the conspiracy are alleged to have been committed within the jurisdiction of the Court of Session, Madras. The learned Judge (Somasundaram, J.) felt that all the petitioners could be tried at the Court of Session, Madras, for the offence of criminal conspiracy at Calcutta and the further acts or offences committed in pursuance of that conspiracy within the jurisdiction of the Court of Session, Madras. But he found that there were two decisions of single Judges of this Court for a contrary view, viz., *Sachidanandam* v. *Sowmya Gopala Ayyangar*[1] (Odgers, J.) and *Dani and others*, In re[2] (K. S. Menon, J.) Our learned brother was not inclined to accept the view of the law in these decision, and preferred instead the decision of a single Judge of the Allahabad High Court in *Bachan Pande* v. *The State*[3], which took a view opposite to the Madras cases. In the context of the importance of this question, and the conflict of authority, he made a reference for placing the papers before a Bench, in consequence of which these petitions are now before us.

The matter has now been extensively argued with citation of authorities, both by the learned Advocate-General and the learned Public Prosecutor for the State, and learned counsel for the petitioners (Sri G. Gopalaswami). We are indebted to the arguments of the learned counsel for the elucidation, and also for bringing to our notice the available and relevant authorities.

The argument of the learned Advocate-General has really two limbs or branches, but they are inter-related and not distinct. It could even be said that one branch leads to the other. The learned Advocate-General presses the thesis that the Court of Session, Madras, would certainly have jurisdiction to try both the offences of criminal conspiracy committed in Calcutta, and the further offences committed in Madras in pursuance of that conspiracy, at a single trial held at Madras. According to the learned Advocate-General, the earlier decision of this Court in *Dani and others*, In re[2] was not correctly decided, as it totally overlooked section 180, Criminal Procedure Code, which applies to the facts. Admittedly, the other decision in *Sachidanandam* v. *Sowmya Gopala Ayyangar*[1] is not so directly relevant upon the question of the jurisdiction of the Court of Session, Madras, to try the accused for both sets of offences here. The learned Advocate-General would develop his atgument thus: Section 177 of the Code of Criminal Procedure which is the ordinary rule as to jurisdiction, itself adopts the English common law rule as to venue, which is a broad and fundamental principle. But that principle is subject to exceptions, whether statutory or springing from interpretation by case-law. It is for this reason that section 177, Criminal Procedure Code, itself significantly declares that

> "every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

This common law principle as to venue will be found stated in Halsbury's Laws of England (3rd Edition), Vol. 10, section 595, page 325. But, as will be clear from section 607 (page 329) of the same authority, criminal conspiracy itself has always been recognised as an exception with regard to the question of venue. The proposition on this matter is of some importance, and is set forth in Halsbury as follows :

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1. (1929) 57 M.L.J. 518 : I.L.R. 52 Mad. 2. A.I.R. 1936 Mad. 317.
: A.I.R. 1929 Mad. 839. 3. A.I.R. 1957 All. 130.

"Conspiracy may be tried in the place where the conspirators agreed to do the wrongful act which is the object of the conspiracy, but as the place of agreement is often unknown, conspiracy is generally a matter of inference deduced from criminal acts of the accused persons which are done in pursuance of any criminal purpose, and are often not confined to one place; a charge of conspiracy may consequently be laid at common law in any country where one of these criminal acts is committed."

This is upon the authority of a very early English case, *R.* v. *Brisac & Scott*[1], We might also refer here to Archbold's "Criminal Pleading, Evidence and Practice" (33rd Edition), pages 1480-1481. The learned author therein points out that the venue may be laid in any country in which the accused persons did an act in furtherance of the common objects of the conspiracy. This principle could also relate to the conspiracy alleged to have been entered into on the high seas (*R.* v. *Kohn*[2].) Also see Russell on 'Crime', Vol. I, (11th Edition), page 679.

The next step of the argument is that the criminal conspiracy, and the acts or offences committed in pursuance of that conspiracy, form a single transaction. This was laid down in a Bench decision of this Court (Sundaram Chetti and Pakenham Walsh, JJ.), in *Hanumantha Rao*, In re[3]. It was confirmed by the Privy Council in *Babulal Chaukhani* v. *Emperor*[4]. Hence it is contended that, with reference to section 235 (1), Criminal Procedure Code, also to be read with section 239 (*a*), Criminal Procedure Code, the accused could be tried at a single trial for both the offences of the criminal conspiracy hatched at Calcutta in the present case, and the further acts of cheating, etc., in pursuance of that conspiracy alleged to have been committed within the jurisdiction of the Court of Session, Madras. This is the first branch or limb of the argument.

But this argument has been met by the learned counsel for the petitioners (Sri Gopalaswami) in the following form, which accepts the substance of the contentions set forth above but nevertheless attempts a valid distinction. Learned counsel urges that the point is not that there could not be a single trial in this respect, but that section 235, Criminal Procedure Code and section 239, Criminal Procedure Code both occur in Chapter XIX of the Code dealing with the 'charge' which is clearly subject to, and governed by, section 177, Criminal Procedure Code, laying down the broad rule as to jurisdiction. In other words, the Court of Session, Madras, could no doubt try the present petitioners both for the offence of criminal conspiracy and the further offences committed in pursuance of the conspiracy at a single trial. But it is essential that the Court should have first jurisdiction to try both sets of offences, and it lacks jurisdiction to try the offence of criminal conspiracy, which occurred at Calcutta. The matter was put in this form by Das Gupta, C.J., in *Jiban Banerjee* v. *State*[5]. Incidentally, we may state that this is also one of the decisions referred to by our learned brother Somasundaram, J. But it is not really in point, for it does not bear on the question whether the Court which has jurisdiction to try the offences committed in pursuance of a criminal conspiracy which occurred elsewhere, cannot also try the accused for the criminal conspiracy at the same trial. It is authority for the converse proposition that the Court which has jurisdiction to try the offence of criminal conspiracy, has no jurisdiction to try offences committed in pursuance of that conspiracy, outside the local limits of the jurisdiction of that Court. We are not now troubled with this converse proposition. But, in the course of the decision, Das Gupta, C.J., observed :—

"The correct position in law, in my opinion, is that the provisions as regards joint trial as provided in sections 235 and 239 will have application only if the Court concerned has jurisdiction under other provisions of law to try the offences sought to be tried together."

This is the gist of the argument, as urged by Sri Gopalaswami for the petitioners. The learned Advocate-General would counter this argument by accepting the qualified form in which the proposition is stated, and by emphasising that section 180, Criminal Procedure Code, is the complete answer to the argument. Hence we are

1. East Term Reports, Vol. IV, p. 164.
2. 4 F. & F. 68.
3. (1933) 66 M.L.J. 193 : I.L.R. 57 Mad. 545.
4. (1938) 1 M.L.J. 647 : L.R. 65 I.A. 158 : 1938 All. L.J. 382 (P.C.).
5. A.I.R. 1959 Cal. 500 (F.B.).

immediately led to the consideration whether section 180, Criminal Procedure Code, would not clothe the Madras Court with jurisdiction to try both the offences committed in pursuance of the criminal conspiracy within its local limits, and the offence of criminal conspiracy which occurred at Calcutta. It is in this sense that the first branch of the argument of the learned Advocate-General leads to the second branch, based on section 180, Criminal Procedure Code.

This depends upon a construction of the precise language and the content of meaning of section 180, Criminal Procedure Code, particularly in the light of the *Illustrations* to that section. I make no apology, therefore, for reproducing the section *verbatim* here :

> " When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be enquired into and tried by a Court within the local limits of whose jurisdiction either act was done."

We shall first analyse the section itself, and the manner in which the clauses are related, before proceeding to the case-law upon this aspect. Clearly, the section contemplates two offences, of which one category is designated as " the first mentioned offence." According to the learned Advocate-General, the illustrations are sufficient to show that the relation between this " first mentioned offence ", and other offences referred to in the section, is a logical relationship, not a chronological sequence. In other words, either offence may be anterior in point of time. But the principle of the section is this. The act must be an offence by reason of its relation to any other act which is also an offence. For the purpose of this analysis, we may omit the clause " or which would be an offence if the doer were capable of committing the offence ", which does not concern us on the present facts. Where such an act which is an offence by reason of its relation to any other act which is also an offence is committed, and the other act which is an offence is also committed, a charge of the " first mentioned offence " may be tried by the Court within the local limits of whose jurisdiction either act was done. The illustrations make the meaning clear. Where an abetment of an offence occurs, and the offence itself is also committed, the charge of abetment may be tried either by the Court which has territorial jurisdiction to try that charge, or by the Court which has similar jurisdiction to try the charge of commission of the offence abetted. Similarly, where theft occurs, and also the offence of receiving or retaining stolen goods with guilty knowledge, the charge under section 411, Indian Penal Code, which is an offence only by reason of its relation to some other act which is an offence (theft), may be tried by either Court of territorial jurisdiction in the same sense. The third illustration similarly relates to the offences of kidnapping and wrongful concealment of the person known to have been kidnapped. Upon the very same logic, where the offence of criminal conspiracy occurs, which is an offence solely by reason of its relation to some other act which is an offence, and an offence in pursuance of criminal conspiracy is also committed the offence of criminal conspiracy, which is the " first mentioned offence " within the meaning of section 180, Criminal Procedure Code, may be tried either at Calcutta where the offence itself occurred, or at Madras where the offence or offences in pursuance of the conspiracy occurred. This is the substance of the interpretation of the learned Advocate-General.

As we shall see later, the opposite view has been adopted upon grounds which, far from being compelling, do not even seem to be valid. The opposite view was adopted in *Emperor* v. *Parsumal Geermul*[1], mainly upon the ground that

> " conspiracy is a substantive offence in itself. It is not given in one of the illustrations to section 180, Criminal Procedure Code, as one of the offences which is an offence because of its relation to another offence ".

We are quite unable to see why the fact that conspiracy is a substantive offence in itself should take the offence of criminal conspiracy out of the ambit of section 180, Criminal Procedure Code. Undoubtedly, the offence of criminal conspiracy

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1. A.I.R. 1938 Sind 108.

is complete when the conspiracy is hatched and there is an agreement, but it is equally indisputable that criminal conspiracy is, in the strict sense, "an offence by reason of its relation to any other act which is also an offence". In the same manner, abetment of an offence is within this category (*Illustration A*), and it may likewise be a completed offence even before the offence abetted is committed. The second ground given in the decision, which we find also stated in a commentary to section 177, Criminal Procedure Code, in Vol. I of Ramanatha Iyer's "Code of Criminal Procedure" (3rd Edition) overlooks the significant fact pointed out by the learned Public Prosecutor. Section 180, Criminal Procedure Code and the *Illustrations* thereto appear to have been framed, prior to the enactment of the sections relating to criminal conspiracy as part of the Indian Penal Code.

Turning to the decisions, we find that K. S. Menon, J., does not give any grounds for his view in *Dani and others*, In re.[1] He merely pointed out that the offence of conspiracy was complete when the parties entered into an agreement to commit the further acts of cheating which is an unassailable proposition. He then observed that the Court would not be clothed with jurisdiction merely because criminal conspiracy and the further acts of cheating might form part of the same transaction. But the learned Judge totally overlooked the provisions of section 180, Criminal Procedure Code, which would specifically clothe the Court trying the further offence of cheating with jurisdiction to try the accused for the offence of criminal conspiracy also, if the terms of the section applied. In *Bachan Pande* v. *The State*[2], the single Judge who gave that decision specifically observed that the Madras case in *Dani and others*, In re,[1] did not consider section 180, Criminal Procedure Code and the learned Judge also dissented from *Emperor* v. *Parsumal Geermul*[3]. The matter was considered more fully and by an analysis of the terms of section 180, Criminal Procedure Code, by Raman Nayar, J., in *Banwarilal and others* v. *Union of India*[4]. The learned Judge was unable to follow the Madras and Sind decisions referred to, and was of the same view as that expressed in *Bachan Pande* v. *The State*[2]. He considered that the offence of criminal conspiracy was very similar to the offence of abetment, for the purpose of section 180, Criminal Procedure Code and that (*Illustration A*) to that section showed that the Court which had jurisdiction to try the further offences committed in pursuance of the conspiracy could also try the charge of criminal conspiracy itself. Once this jurisdiction is so invoked it cannot be doubted that the acts form together one transaction, so that a single trial would be competent.

The argument of Sri Gopalaswami for the petitioners upon this aspect is a somewhat subtle one. Learned counsel urges that what section 180, Criminal Procedure Code, really contemplates is that an act must be an offence strictly by reason of its relation to some "other act which is also an offence", which does not mean an act in mere contemplation or which is juristically defined as an offence, but an act which actually occurs or has occurred. Upon this interpretation, therefore, learned counsel would argue that the offence of criminal conspiracy, is excluded, because the offence is complete by the hatching of the conspiracy, and does not require a further act or an offence, committed, in pursuance of it. But the same argument would apply to the offence of abetment (*Illustration A*) and this is precisely what Raman Nayar, J., pointed out and stressed in *Banwarilal and others* v. *Union of India*[4]. In other words, the offences of criminal conspiracy or abetment would be relevant to the scope of section 180, Criminal Procedure Code, only where any further offence is committed in pursuance of the conspiracy, or where the offence abetted is also committed. We agree with the interpretation of the learned Advocate-General that the first part of section 180, Criminal Procedure Code, is so worded as to imply that the "first mentioned offence" really refers to an act which is an offence by reason of its relation to any other act which may be contemplated, and which is juristically defined as an offence. In any event, upon the logic which would specifically include both abetment, which may be a completed offence by itself, and the offence abetted (*Illustration A*) within the scope of the section, it

1. A.I.R. 1936 Mad. 317.
2. A.I.R. 1957 All. 130.
3. A.I.R. 1938 Sind 108.
4. A.I.R. 1959 Ker. 311.

must certainly be held that both the offence of criminal conspiracy and the offence committed in pursuance of it would properly fall within its ambit. Since the "first mentioned offence" can refer to the charge of criminal conspiracy alone, the Court which has jurisdiction to try the offence committed in pursuance of it, can also try the offender or offenders upon the charge of conspiracy. We would hence hold that the prior decisions of this Court in *Sachidanandam* v. *Sowmya Gopala Ayyangar*[1], only to the extent to which this decision may be relevant upon this aspect and *Dani and others, In re*[2] have to be differed from. It follows that the petitions to quash the commitments are liable to be dismissed, and we accordingly direct that they be dismissed.

P.R.N. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

S. Venkatesh Kotadia .. *Appellant**

v.

Shantha Bai and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 65 and Order 21, rules 92 and 94—Confirmation of sale held in execution of decree—Necessity for and effect—Power and duty of Court—Continued subsistence of decree—If necessary.

As contrasted with the provisions of section 316 of the old Civil Procedure Code of 1882, under the corresponding provisions of section 65 and Order 21, rule 94 of the present Code, the property sold in execution of a decree becomes vested in the purchaser on the date of the sale, though such vesting becomes effective when the sale is confirmed. But having regard to the fact that the vesting is on the date of the sale and the continued subsistence of the decree is no longer a condition precedent to the issue of a sale certificate under Order 21, rule 94, confirmation of sale under rule 92 is no longer conditional upon the existence, on the date of confirmation, of an outstanding decree in execution of which the sale had taken place. Moreover rule 92 of Order 21 is imperative and the Court is bound to confirm a sale unless it is set aside under the provisions of rules 89 to 91 of Order 21. Cases of fraud, restitution, etc., may however stand on a different footing and different considerations may apply in particular circumstances where the decree-holder himself is the purchaser.

Ambujammal v. *Thangavelu Chettiar*, (1941) 1 M.L.J. 193, followed.

Hence an execution sale in favour of a stranger auction purchaser has got to be confirmed under Order 21, rule 92, Civil Procedure Code, notwithstanding the fact that the decree in execution of which the sale took place, had, before its confirmation, been modified on appeal with the result that on the date of sale the decree remained over-paid and nothing was due under the same.

Appeal against the order of the City Civil Court (IV Assistant) Madras, in E.A. No. 2209 of 1956 in E.P. No. 133 of 1955 (in O.S. No. 17 of 1941, Joint City Civil Judge, Nadiad.)

C. R. Rajagopalachari and *B. T. Sampath*, for Appellant.

T. R. Srinivasa Ayyangar, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal raises an interesting question as to whether an execution sale of immovable property to a stranger-purchaser has got to be confirmed under Order 21, rule 92, Civil Procedure Code, notwithstanding the fact that the decree, in execution of which the sale took place, had, before its confirmation, been modified on appeal therefrom, with the result that on the date of the sale, the decree remained over-paid and nothing was due under the same. In such circumstances, the lower Court declined to confirm the sale on the view that, on the date of the sale, nothing was due to the decree-holders for which they could put up the property for sale. Aggrieved by that order, the stranger-purchaser has filed this appeal.

On 31st March, 1954, in Suit No. 17 of 1941, the Joint Civil Judge, Nadiad, passed a decree for Rs. 39,878-7-9 with costs in favour of Santha Bai and Dave

1. (1929) 57 M.L.J. 518 : I.L.R. 52 Mad. 991 : A.I.R. 1929 Mad. 839.
2. A.I.R. 1936 Mad. 317.

* C.C.C.A. No. 58 of 1957.

30th June, 1960.
(9th Jyaistha, 1882, Saka).

Bhavani Sankar and against three defendants, Dave Jetharam Jebhai (deceased), Dave Ganpatram Jetharam and Dave Jayadevlal Jetharam. By E.P. No. 133 of 1955, on the file of the City Civil Court at Madras, the house and ground No. 8, Ragunayakalu Street, Park Town, Madras, was sold for Rs. 15,000 in execution, but on an application made by one of the defendants the sale was set aside. Davey Govindram, the 2nd defendant, paid Rs. 20,000 and part satisfaction of the decree was entered by an order, dated 19th March, 1956. By the same execution petition an one-third share in the house and ground No. 88, Mint Street, Park Town, was also put up for sale and knocked down to Venkatesh Kotadia, a stranger, who is the appellant before us, for Rs. 7,000 on 4th May, 1956. Meanwhile, there was an appeal against the decree in Suit No. 17 of 1941 and by judgment, dated 31st October, 1956, the appellate Court varied the decree by reducing the amount recoverable to Rs. 5,326-4-1 with interest and costs. There is no dispute about these facts and it would be seen that on the date of the sale in favour of the appellant, the decree as revised remained more than satisfied on account of the payment of Rs. 20,000 by the 2nd defendant in the suit.

The appellant had deposited the entire sale price and there was no application filed by any of the parties within the prescribed time to set aside the sale. He, therefore, filed the application out of which the present appeal arises for confirmation of the sale.

It was contended in support of the appeal before us that once a valid sale had taken place and no application filed to set it aside under any of the rules 89, 90 or 91, the Court had no option but to confirm the sale and that the fact that on the date of the sale no amount was owing under the revised decree for which the property could have been sold, was not a ground for refusing confirmation where the interests of a stranger-purchaser were involved. The learned counsel for the appellant based his contention on the authority of *Seth Nanhelal* v. *Umrao Singh*[1], *Sorimuthu Pillai* v. *Muthukrishna*[2] and *Ambujammal* v. *Thangavelu Chettiar*[3]. The legislative history of section 65 of the Code of Civil Procedure, the language of rule 92 of Order 21 which appears imperative and the considerations for safeguarding the interests of a *bona fide* stranger-purchaser for value have led the Court in these cases to the conclusion that the subsistence of an outstanding decree on the date of confirmation is not an essential requisite for confirmation of the sale and that the only grounds for refusing confirmation are those provided by the Code. *Seth Nanhelal* v. *Umrao Singh*[1] was a case in which after a sale to a stranger in execution of a decree and before confirmation thereof, the decree-holders and the judgment-debtors reported an adjustment of the decree out of Court and it was prayed that the same might be recorded and certified and that the properties sold be released to the judgment-debtors from the sale. The Courts in India having granted the prayer, the stranger-auction-purchaser by Special Leave successfully appealed to the Privy Council. The view on which the Court of the Judicial Commissioner had refused confirmation was that an adjustment between the decree-holder and the judgment-debtor come to at any time before confirmation of an execution-sale nullified the decree, taking away the very foundation of the Court's power to execute the decree, namely, the existence of a decree capable of execution. Dealing with this view, Sir George Lowndes observed on behalf of the Board :

"Their Lordships are unable to concur in this reasoning. In the first place Order 21, rule 2, which provides for certification of an adjustment come to out of Court clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale which has been duly carried out, are those embodied in rule 89, *viz.*, by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of sale—see Article 166, Schedule I of the Limitation Act, 1908. That this is so is, in their Lordships' opinion, clear under the wording of rule 92, which provides that in such a case (*i.e.*, where the sale has been duly

1. (1930) 60 M.L.J. 423 : L.R. 58 I.A. 50 (P.C.).
2. (1933) 65 M.L.J. 253 : I.L.R. 56 Mad. 808 : A.I.R. 1933 Mad. 598.
3. (1941) 1 M.L.J. 193.

carried out), if no application is made under rule 89 'the Court *shall* make an order confirming the sale and thereupon the sale shall become absolute'."

On that interpretation, the Privy Council allowed the appeal holding that the purchaser was entitled to confirmation of the sale. Although it should not be within the province of the decree-holder and the judgment-debtor by an agreement between themselves out of Court to prejudice the rights of a third party purchaser in a Court auction sale, the decision of the Privy Council was also grounded on the imperative character of the language used in rule 92. The point was elaborately considered by Madhavan Nair, J., in *Sorimuthu* v. *Muthukrishna*[1]. In that case between the date of sale to a stranger and the date of confirmation thereof, the decree on the foot of which the sale had taken place, was set aside by the appellate Court. The judgment-debtors, in the circumstances, prayed that the auction-sale should not be confirmed and that the sale should be set aside. Though their application purported to be under Order 21, rule 89, the applicants had not complied with the requirements of that rule by making all the necessary deposits mentioned therein. The question of confirmation of the sale had, therefore, to be viewed apart from rule 89. The argument was that since the decree had been set aside by the appellate Court, there was no jurisdiction for the Court to confirm the sale. The learned Judge rejected the contention and reached the conclusion that there was no option for the Court but to confirm the sale on the view that the omission of the *Proviso* to section 316 of the Code of Civil Procedure, 1882, was indicative that the continued existence of a decree was no longer necessary as a condition for confirming the sale and that having regard to the decision of the Privy Council already referred to, the language of rule 92 left no choice for the Court. The same view was taken of the relative provisions by Wadsworth, J., in *Ambujammal* v. *Thangavelu Chettiar*[2], That again was a case of an execution sale to a stranger and an application under Order 21, rule 90, had been dismissed. But before confirmation of the sale, the appellate Court had set aside the decree and dismissed the suit so that on the date when the confirmation of the sale came up for consideration the decree had ceased to have a judicial existence. Nevertheless, the sale was confirmed. It was the correctness of this order that was challenged before the learned Judge. After considering *Sorimuthu Pillai* v. *Muthukrishna*[1] and *Seth Nanhelal* v. *Umrao Singh*[3] and certain other cases of the Calcutta and Nagpur High Courts, the learned Judge held that the balance of authority was in favour of the view taken by Madhavan Nair, J., and that he could see no reason to take a different view. With respect, we concur with Wadsworth, J.

Section 316 of the Code of 1882 ran thus :

"When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate shall bear the date of confirmation of the sale : and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before :

Provided that the decree under which the sale took place was still subsisting at that date."

It is clear from this provision that (1) the property sold vested in the purchaser not from the date of sale but from the date of the certificate and that (2) on the date of issuing the certificate the decree under which the sale took place must still be subsisting. Section 316 of the old Code is now substituted by the present section 65 and rule 94 of Order 21 of the Code of 1908. Section 65 states that

"where immovable property is sold in execution of a decree and such sale has become absolute' the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute."

The sale becomes absolute when it is confirmed under rule 92. The position therefore, obtaining under the existing provisions of the Code is that the property becomes vested in the purchaser on the date of the sale and as a result of the omission,

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1. (1933) 65 M.L.J. 253 : I.L.R. 56 Mad. 808 : A.I.R. 1933 Mad. 598.
2. (1941) 1 M.L.J. 193.
3. (1930) 59 M.L.J. 423 : L.R. 58 I.A. 50 (P.C.).

of the proviso to section 316 of the old Code from the present Code, the requirement that the decree under which the sale took place should still be subsisting on the date when the certificate under rule 94 is issued, has disappeared. The vesting of the property in the purchaser on the date of sale no doubt becomes effective when the sale is confirmed. But the fact that the vesting is on the date of sale coupled with the fact that the continued subsistence of a decree is no longer a condition precedent to the issue of a sale certificate under rule 94 appears to point to the necessary corollary that confirmation of a sale under rule 92 is no longer conditional upon the existence on the date of confirmation, of an outstanding decree in execution of which the sale had taken place. Apart from that, where a sale has taken place, rules 89 to 91 provide the grounds and the procedure for setting aside the sale. Where one or the other of these rules has not been availed of, or if availed of but unsuccesfully rule 92 directs " the Court shall make an order confirming the sale." The language is imperative and leaves no discretion. In such circumstances, the Court is bound to consider confirmation of the sale and no considerations outside what is provided under rule 92 may be germane, especially in cases in which the rights of stranger-purchasers at Court auction sale for value are involved. Cases of fraud in execution sales may stand on a different footing. So too in cases where the decree-holder himself is the purchaser, different considerations in particular circumstances, may apply and the judgment-debtor, in the event of a decree, in execution of which his property has been sold, being set aside on appeal, may properly ask for cancellation or restitution. But we are not called upon in this case to decide those questions.

The learned counsel for the judgment-debtors conceded before us that the balance of authority was against him but urged that from the standpoint of justice to his clients, we must invoke our inherent powers under section 151 of the Code of Civil Procedure and refuse confirmation of the sale. It is obvious that we cannot accede to this request because it is well settled that where a matter is covered by specific provisions in the Code, resort cannot be had to section 151. Further, the question of confirmation of a sale in favour of a stranger-purchaser has to be approached not so much from the standpoint of justice, as it is essentially a question of policy in relation to the power of the Court to effectively enforce its own decrees and safeguard the rights and interests of an innocent third-party or stranger-purchaser for value in Court auction. On this aspect as well, we are, with due respect, in agreement with the observations of Wadsworth, J., in *Ambujammal* v. *Thangavelu Chettiar*[1].

The appeal, is therefore, allowed and E.A. No. 2209 of 1956 will stand ordered. The appellant will have his costs from respondents 3 and 4 throughout.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

A. Marcalline Fernando .. *Petitioner**

v.

St. Francis Xavier Church, Kottar, by the Present Parish Priest Rev. Father S. Barnabas .. *Respondent.*

Civil Procedure Code (V of 1908), section 133 and Order 26, rule 1—Issue of Commission to examine witness—Scope of power.

The examination of a witness on Commission is not an alternative to an examination in Court as one of the fundamental rules of procedure in judicial trial is that the Judge who is charged with the decision of a case should himself hear the evidence. Unless the conditions laid down in Order 26, rule 1 or section 133, Civil Procedure Code are satisfied, a Court, would have no jurisdiction to delegate the examination of witnesses to a Commission on the supposed theory that evidence in Court is necessary only in cases where the witness is likely to speak an untruth elsewhere. The mere fact that by reason of his culture and background as a priest a person could be expected to speak only the truth would not by itself be a sufficient ground to entitle him for examination on Commission.

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* C.R.P. No. 547 of 1959.

1. (1941) 1 M.L.J. 193.

12th February, 1960.
(23rd Magha, 1881, Saka).

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Principal District Munsif, Nagercoil, dated 19th February, 1959 and made in I.A. No. 2654 of 1958 in O.S. No. 275 of 1958.

V. Srinivasan, for Petitioner.

A. P. C. Albuquerque, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the District Munsif of Nagercoil in I.A. No. 2654 of 1958 in O.S. No. 275 of 1958, issuing a commission for the examination of the Bishop of Kottar. The lower Court has held that such examination is authorised under the provisions of Order 26, rule 1, read with section 133, Civil Procedure Code. It is, however, not the case of the respondent (the petitioner in the lower Court) that the Bishop of Kottar is either exempted under the Civil Procedure Code, 1908, from attending Court or is unable to attend Court, by reason of any sickness or infirmity. The only ground urged is that he is a person in exalted position, being a spiritual head and dignitary of the church, and as such should not be compelled to appear in Court. The learned District Munsif, who accepted the contention, observed thus :—

"The only ground in favour of the respondent is his allegation in his order that truth can be found only if the person sought to be examined is examined in Court. In this respect that person being a cultured person with a deep religious background can be expected to speak only the truth. There is no necessity to find whether the witness is speaking the truth as in the case of witnesses who frequently are in the habit of resorting the Courts for giving evidence".

The approach to the question, as well as the reason advanced for justifying the issue of a commission, are both incorrect. The examination of a witness on commission is not an alternative to an examination in Court, so as to vest in a Court a power to issue a commission in all cases where it was apparent that the witness is likely to speak the truth. One of the fundamental rules of procedure in judicial trials is that the Judge who is charged with the decision of a case should himself hear the evidence. A finding of fact arrived at by a Judge who himself saw and heard all the witnesses is of greater value than that by one who did not do so. The impression that could be gathered by a Judge in an oral examination of witnesses is not merely the result of the answers given by them but several undefinable matters like the manner of giving evidence, the immediate reaction to question, etc. The Civil Procedure Code statutorily provides for the cases in which examination of witnesses can be done on commission. Section 133 provides exemption from personal appearance in regard to certain persons. It is not contended that the Bishop is one of those persons exempted under section 133, Civil Procedure Code. Nor is his case covered by the provisions of Order 26, rule 1 or rule 4, Civil Procedure Code. If the conditions laid down in those provisions are not satisfied, the Court would have no jurisdiction to delegate the examination of witnesses to a Commissioner on the supposed theory that evidence in Court is necessary only in case where a witness would speak an untruth elsewhere. Nor can I subscribe to the proposition that there is a presumption in the case of certain witnesses that they would always speak truth. The question whether a witness is speaking the truth, is not a matter of assumption or presumption but one for determination after the evidence is taken and the matter judged in the light of the circumstances. While a Court might be slow to presume that a man of culture is speaking an untruth, it will be abdicating its functions if it were to hold in advance that what he might say would be the truth. Estimable persons who might not give false evidence might have given such evidence either by mistake bias or other influences and it is the function of the Court to assess the worth of such testimony. There is no difference so far as Courts are concerned whether the evidence is given by the meanest citizen or the highest spiritual dignitary. In *Panachand Chotalal* v. *Manoharlal Nandalal*[1], it was held that a religious preceptor who was a party to the suit was not entitled, by reason merely of his rank, to be examined on commission.

1. (1917) I.L.R. 42 Bom. 136.

Under the provision of section 133, Civil Procedure Code, prior to its amendment by Act LXVI of 1950, there was a power vested in the State Government to exempt, by notification, from personal appearance in Court any person whose rank, in the opinion of such Government, entitled him to the privilege of exemption. That provision has now been repealed by reason of the amendment. Except in cases covered by sections 132 and 133 there can be no exemption from appearance in Court. The mere reason that a witness, by reason of his culture and background, could be expected to speak the truth, whether examined on commission or before Court, would not be sufficient to entitled him for examination on commission.

Yet another reason is given by the lower Court. When Nagercoil was part of the Travancore State, His Highness the Maharaja of Travancore had exempted the Bishop from personal attendance in Court under section 133 of the Travancore Civil Procedure Code and such exemption would avail even now. The lower Court failed to notice that the issue of a commission for examination of a party or witness is purely a matter of procedure : no party or witness can be said to have any vested right in such procedure. The exemption that was granted by the Maharaja of Travancore, would enure only so long as the Travancore Civil Procedure Code, under which it was granted, was in force. The Civil Procedure Code of 1908 applies to all the States in the Indian Union, and exemption granted under the Travancore Civil Procedure Code would no longer avail, in the absence of any statutory safeguard preserving the rights secured under that Code. As pointed out already, Act LXVI of 1950 has repealed the provision, regarding the Government's right to exempt certain persons from appearance in Court, and it is not possible for any State Government, by notification, to exempt any person from such appearance. The order of the lower Court, issuing a commission, cannot, therefore, be sustained, and it is set aside.

The Civil Revision Petition is allowed with costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Gulam Mohamood .. *Appellant**

v.

Ammani Ammal (deceased) and others .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 106 and 111 (g)—Notice to quit and forfeiture of lease—Requisites of a valid notice—Denial of lessor's title—When operates as forfeiture of lease.

A valid notice to quit under section 106 of the Transfer of Property Act should determine the tenancy by the time of 15 days expiring with the end of the month of tenancy. The notice should specifically state what the month of the tenancy was.

In order to plead in a suit that a denial of the title of the lessor or a disclaimer of the tenancy operates as forfeiture of the lease under section 111 (*g*) of the Transfer of Property Act, the denial and forfeiture must have occurred prior to the suit and should form part of the cause of action on which the suit is based. A denial of tenancy after the suit is instituted will not operate as a forfeiture under section 111 (*g*) of the Transfer of Property Act.

Appeals against the decree of the City Civil Court in Madras in O.S. No. 116 of 1955.

A. Dorairaj, for Appellant in C.C.C. App. No. 18 of 1957 and for Respondent in C.C.C. App. No. 22 of 1957.

K. C. Jocob and *S. K. L. Ratan*, for Respondent in C.C.C. App. No. 18 of 1957 and for Appellant in C.C.C. App. No. 22 of 1957.

The Court delivered the following

JUDGMENT.—These are related appeals by the plaintiff and the defendants respectively in a suit for recovery of arrears of rent, damages for use and occupation, and possession through ejectment. The suit was decreed with costs as prayed for.

*C.C.C.A. Nos. 18 and 22 of 1957. 1st April, 1960. (12th Chaitra, 1882—Saka).

The plaintiff (landlord) purports to be aggrieved by the decree which is not in respect of the entire land according to the plaint schedule, but is specifically limited to the 5 or 6 huts thereon occupied by the defendants. The defendants (tenants) claimed to be aggrieved by the decree in ejectment, which totally ignores the provisions of the Madras City Tenants' Protection Act (Act III of 1922 as modified by Act XIX of 1955) and particularly the rights given to tenants under sections 3 and 11 of that Act. These related appeals thus raise the following issues : (i) whether the Madras City Tenants' Protection Act, 1921 (Act III of 1922), applies to the present case, either as it stood, or as amended by Madras Act XIX of 1955; (ii) whether, if the Act is applicable, the decree in ejectment can be supported, when the landlord admittedly failed to comply with the provisions of section 11 of the Act, and when section 3 of the Act has also not been complied with ; (iii) whether the fact that the tenants preferred I.A. No. 124 of 1956 under section 9 of the Act for exercising the option to purchase the land, which was dismissed by the Court below on the ground of limitation, amounts to any waiver by the tenants of the requirements of section 11, upon the authority of *Vedachala Naicker* v. *Doraiswami Mudaliar*[1] and (iv) whether, assuming that the suit ought not to have been decreed for ejectment the portion of the decree which relates to the claim for arrears of rent ought to be sustained, and what further observations should be now made concerning the mutual rights of parties ?

In the interests of justice I am constrained to observe that the trial of this suit by the learned Additional Judge of the City Civil Court, appears to have been both hasty and superficial. The learned Judge does not find that the Madras City Tenants Protection Act, 1921 (Madras Act III of 1922) as modified by Madras Act XIX of 1955, does not apply to the facts of this case, or to the parties. But he seems to hold, as far as I can follow him, that since the defendants denied the tenancy in their written statement and set up an independent title perfected by adverse possession, they should be held to have forfeited their rights under section 111 (*g*) of the Transfer of Property Act. I shall quote the authorities on this aspect later, but two broad propositions must suffice to dispose of this reasoning, which is fallacious. Firstly, the defendants admitted the tenancy at the trial, as the learned Judge explicitly finds, and even filed I.A. No. 124 of 1956 for reliefs under section 9 of the Act, as acknowledged tenants. Secondly, the law is very clear that for section 111 (*g*) of the Transfer of Property Act to operate, the forfeiture alleged must have occurred *prior* to the suit, so that it would be part of the cause of action upon which the suit was based. The authorities are very clear that a denial of the tenancy after the suit is instituted, would not work out as any such forfeiture of the lease under section 111 (*g*) of the Transfer of Property Act. Further, as I have observed, the repudiation of the tenancy by the defendants in the written statement was not adhered to at the trial, and the defendants expressly acknowledged the tenancy and claimed the protection of the City Tenants' Protection Act, Madras Act III of 1922, as amended by Madras Act XIX of 1955. Therefore, the fact that the notice issued in this case (Exhibit A-1, dated 27th July, 1954) admittedly ignores the provisions of section 11 of the Act does, according to all the authorities, render the suit in ejectment liable to be dismissed.

I shall first dispose of the argument relating to forfeiture before proceeding further. It is clear enough that this matter was not carefully gone into by the lower Court, with reference to the authorities. It is indisputable that the tenancy was denied and an independent title by prescription advanced only after the suit was instituted, and through the written statement, and at no earlier stage. The Privy Council observed in *Maharaja of Jeypore* v. *Rukmini Pattamahadevi Garu*[2] ;

"Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted ; See *Nizamuddin* v. *Mamtazuddin*[3] already referred to and the previous case of *Pramath Shaha* v. *Madhu Khula*[4] there cited ".

1. (1950) 1 M.L.J. 32.
2. (1918) 36 M.L.J. 543 : L.R. 46 I.A. 109 : I.L.R. 42 Mad. 589 (P.C.).
3. (1900) I.L.R. 28 Cal. 135.
4. (1886) I.L.R. 13 Cal. 96.

In Mulla's Transfer of Property Act, 1956 Edition, at page 688, the learned author observes with reference to section 111 (*g*) :

"The disclaimer must be before suit filed to eject the lessee, that is on the principle that the cause of action must be based on something accruing before the suit, and the rule is followed by all the Courts in India, for it has been held that a disclaimer in the written statement or after suit filed, will not support a forfeiture."

That disposes of the argument that any forfeiture of their rights by the tenants really occurred in the present case. The tenants were undoubtedly not barred from claiming the benefits of the Madras City Tenants' Protection Act, and, as I have earlier stressed, it is not in dispute that the notice was not in accordance with section 11, and that, in fact, compensation for the improvements (building and trees) has neither been offered by the landlord, nor assessed in this case, in accordance with the provisions of the Act.

Even otherwise, and assuming for a moment that the Madras City Tenants' Protection Act does not apply, the notice was not even in accordance with section 106 of the Transfer of Property Act read with section 111 of the Act, as it should otherwise be. The authorities are very clear that such notice, to be valid, must determine the tenancy by the time of 15 days expiring with the end of the month of the tenancy. In the present case, there was simply no evidence to prove when the tenancy began, or what the month of the tenancy was. The notice, Exhibit A-1 requires delivery of possession with the expiry of a month ending with 30th August, 1954. But even in the plaint, I find no averment whatever about the actual date of commencement of the tenancy, or whether the tenancy ran from the commencement from the first of each calendar month. There is a most vague and unsatisfactory allegation that the defendants were tenants ' in or about the end of the year 1950'. There is no other evidence. Apart from this, it is very difficult to see why the Madras City Tenants' Protection Act will not apply to the case. *Prima facie* it will apply, for under the Act as amended by Madras Act XIX of 1955, it has been made applicable, in the City of Madras, "to tenancies of land created before the commencement of the Madras, City Tenants' Protection Act (Amendment) Act, 1955." Also see *Kanniappa Chettiar* v. *Ramachandra Iyer and another*[1], for the view that section 9 of Act III of 1922 did apply to cases in which suits were pending at that time, and even where suits had resulted in decrees, which had not been fully executed.

Learned counsel for the landlord attempts to argue, upon the strength of certain observations of Chandra Reddy, J., in *Vedachala Naicker* v. *Doraiswami Mudaliar*[2], that there is an option given to the tenant either to choose the benefits under section 9 or under section 11, and that where the tenant chooses the benefits under section 9 he must be held to have waived the objection that the suit itself was not instituted in accordance with the mandatory provisions of section 11 of the Act. I have read this decision carefully (the head-note itself is somewhat misleading), and I am quite unable to see how any principle of the decision can apply to the present facts. Firstly, I must observe that it has been clearly laid down in several prior decisions of this Court that the provisions of section 11 of the Madras City Tenants' Protection Act were mandatory, and that failure to comply with those provisions would necessarily entail the dismissal of the suit. Those authorities are : *Rahmat Bi* v. *Krishna Doss Lala*[3], *Ganesa Naidu* v. *Mallaram Singh*[4], *Ranganathan* v. *Mariappa Chetti*[5]. Patanjali Sastri, J., as he then was, explicitly finds in the last decision that the provisions of section 11 were mandatory, and that absence of compliance with those provisions would be fatal to the suit. Chandra Reddy, J., definitely observes in *Vedachala Naicker* v. *Doraiswami Mudaliar*[2], that he was not differing from these prior authorities. Actually, had he done so, the matter would necessarily have proceeded to a Bench for an authoritative pronouncement.

1. (1922) 46 M.L.J. 407.
2. (1950) 1 M.L.J. 722.
3. A.I.R. 1940 Mad. 641.
4. (1937) 1 M.L.J. 507.
5. (1942) 1 M.L.J. 92 : A.I.R. 1942 Mad. 334.

The learned Judge then states:

"I am inclined to agree with the argument advanced on behalf of the petitioner that the only consequence of the failure to observe the provisions of section 11 of the City Tenants' Protection Act is the dismissal of the suit, and that it does not affect the institution of the suit."

With great respect, I do not find the reasoning of the above passage to be very clear, particularly in view of the explicit language of Patanjali Sastri, J., in *Ranganathan* v. *Mariappa Chetti*[1]. But this point need not trouble us at present. The point is that, in any event all these authorities including *Vedachala Naicker* v. *Doraiswami Mudaliar*[2], stress that failure to comply with the mandatory provisions of section 11 would be fatal to the suit. But the learned Judge later observed:

"Further it must be borne in mind that the provisions of section 11 of the Act were enacted for the benefit of the tenant, as pointed out in the rulings referred to above, and not for his detriment, and the landlord cannot therefore take advantage of the provision to the prejudice of the tenant."

The facts of that case show that the landlord desired to withdraw the suit in ejectment under Order 23, rule 1, Civil Procedure Code, after the defendants had filed an application under section 9 of the Act, on the ground of the formal defect arising from the failure to comply with the provisions of section 11. The landlord was not permitted to do so, as such permission would entail the loss of privilege or right of the tenant to purchase the land, under section 9, with reference to his application. The present facts are totally different. Here, we have a case of a tenant, who actually could not obtain the benefit of section 9 of the Act, because his application was out of time. The Court has no power to condone such a delay. *Vide* Observations of Subrahmanyam, J., in *Nagammal* v. *Govindarajulu*[3]. The result is that the tenant was not able to exercise any option, and to obtain the benefits of section 9 of the Act. Under those circumstances, it would be opposed to all principles of equity, and to the law, to hold that the tenant's unsuccessful attempt to invoke section 9 amounts to a waiver with regard to his rights under sections 3 and 11 of the Act, and that, in consequence, the suit must be held to have been validly instituted, notwithstanding the failure to comply with section 11, the provisions of which are mandatory and absolute.

I think it is very clear, therefore, that this suit ought not to have been decreed in ejectment. Learned counsel for the landlord now states that the improvements may be ascertained, and the compensation determined, which the landlord would be willing to pay. But that is not the proper procedure. The proper procedure is for the landlord to issue a fresh notice in ejectment, complying with the mandatory provisions of the Madras City Tenants' Protection Act, and to take appropriate proceedings if the lessees do not surrender possession. In this view, it is not necessary to deal on the merits with the appeal of the landlord relating to the specific areas leased.

As there is no objection to decree for rent as awarded, I confirm that portion of the decree alone. The decree in ejectment is set aside. Under the circumstances, including the fact that the plaintiff is a person functioning as a *mutawalli* of a Muslim Wakf and not in his personal right, I direct the parties to bear their own costs throughout.

R.M. *Decree in ejectment set aside.*

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1. (1942) 1 M.L.J. 92 : A.I.R. 1942 Mad. 334.
2. (1950) 1 M.L.J. 732.
3. (1958) 1 M.L.J. 286.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE JAGADISAN.

M. A. Abdul Malick Saheb .. *Appellant**

v.

T. P. Muhammad Yousuf Sahib and others .. *Respondents.*

Contract Act (IX of 1872), section 16—Undue influence—What is—Gift from child to parent soon after attaining majority—Presumption of undue influence.

Transactions in the nature of a bounty from a child to a parent are in equity looked upon with caution by Courts and it is the duty of the donee to prove that the gift was the result of free exercise of independent will and the Court should be satisfied that the donor was acting independently without any influence from the donee. The mere existence of the fiduciary relationship of parent and child between the donee and the donor raises a presumption of undue influence and it is on the donee to rebut the presumption.

Appeal against the decree of the Court of the Subordinate Judge of Vellore, dated 5th July, 1956 and passed in Original Suit No. 32 of 1955.

K. Krishnaswami Ayyangar, N. C. Raghavachari, N. S. Varadachari and *Narottam Jain*, for Appellants.

V. C. Viraghavan, for 1st Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—T. P. Ahmed Hussain Sahib, a Muslim resident of Tirupattur, North Arcot District, died on 24th July, 1952, leaving behind considerable properties and two widows, 7 sons and 3 daughters. Zuleika Bi was one of the two surviving widows. She had 3 sons by Ahmed Hussain, the eldest of whom was T. P. Muhammad Yousuf Sahib. He was a lad about 18 years old at the time of his father's death, and his two younger brothers were still minors. There was a partition of the estate of the said Ahmed Hussain Sahib between his heirs in which all the heirs including Zuleika Bi and Muhammad Yousuf Sahib got their legitimate share of the properties as per Muslim Law. Zuleika Bi's brother was one Abdul Jabbar Sahib, a merchant at Hindupur, having a residence at Tirupattur also. He evinced interest in the affairs of his sister and was instrumental in bringing about an amicable division of the assets of the deceased Ahmed Hussain between his heirs. Yousuf Sahib was living with his mother and he executed two documents in her favour, one called a gift deed and the other a deed of release by which he completely denuded himself of all the properties he got as a sharer in the estate of his deceased father. These documents are dated 12th July, 1953 and 13th July, 1953. Within a few months thereafter on 1st January, 1954, the mother Zuleika Bi, the donee from her son Yousuf Sahib purported to sell the properties which she got from her son to a stranger to the family, one Abdul Malik Sahib stated to be a shroff merchant at Tirupattur for an alleged consideration of Rs. 7,900. The properties consist of a building with a rice mill, machinery and plant, which was leased out by the late Ahmed Hussain himself during his lifetime to one Ramalingam Pillai for a monthly rental of Rs. 125.

Yousuf Sahib filed O.S. No. 32 of 1955 on the file of the Sub-Court at Vellore challenging the validity of the transactions entered into by him with his mother, who in turn had purported to sell the properties she got to a stranger, and prayed for rescission of the said transactions and for recovery of possession of the properties together with mesne profits claimed at Rs. 125, a month from 12th July, 1953 till delivery of possession. The first defendant in the suit was his mother Zuleika Bi, the second defendant was the alienee from his mother and the third defendant was the lessee in possession of the properties.

The averments in the plaint constitutes a jumble of ill-assorted ideas and legal conceptions. It is stated therein that the plaintiff yielded to the insistence, pressure and importunities of his mother, and that he was impelled to act as he did by gratitude, affection and respect for a parent. It is also said that the plaintiff was put in fear of bodily harm both by his mother and uncle (Abdul Jabbar). The plaint further averred that his mother was in a position to dominate his will and that he was not

*Appeal No. 272 of 1956.

21st March, 1960.
(1st Chaitra, 1882, Saka.)

a willing or free agent in executing the impugned documents. It is clear, however, from a reading of the plaint that the plaintiff's main ground of attack on the transactions in favour of his mother was one based upon a plea of undue influence.

The case of the first defendant was that the plaintiff acted voluntarily in executing the documents in her favour, that he exercised a free and independent mind in regard to the transactions, and that the story of her having been in a position to dominate the will of her adult son, and of his having been put in fear of bodily harm was a mere myth.

The second defendant in the suit, the alienee from the mother while supporting the case of the first defendant in respect of the transaction, of course, pleaded that he was a *bona fide* purchaser for value.

The learned Subordinate Judge of Vellore found that the impugned transactions were vitiated by undue influence and fraud, that the second defendant the alienee was not a *bona fide* purchaser for value and accordingly decreed the suit in favour of the plaintiff. He also awarded mesne profits in his favour at the rate of Rs. 125 a month both past and future.

The second defendant is the appellant before us. The contentions on his behalf in this Court were the same as in the Court below.

Exhibit A-3 dated 19th August, 1952 is the deed of partition between the heirs of the late Ahmed Hussain Sahib. The defendant got the properties described in Schedule A to the said document valued at Rs. 1,250 besides her mahr amount of Rs. 650. The plaintiff got the properties described in Schedule B to the said document valued at Rs. 1,250. The other sharers got the other properties described in the various schedules to the said document. It is noteworthy that the first defendant obtained under the partition properties and assets which are at least of the same value as those got by the plaintiff.

Exhibit B-1 dated 12th July, 1953 is the deed of gift by the plaintiff in favour of the first defendant. In form and in substance it is gift pure and simple. The object and purpose of the said transaction is recited as follows therein :

"Taking into consideration the fact that the properties obtained by you are not enough for your livelihood that I am proceeding to outside places in connection with business and that you being my mother should live comfortably I have gifted to you the under-mentioned property of the value of Rs. 1,000 and have delivered possession thereof to you ".

No element of consideration or *quid pro quo* is recited in the document.

On 13th July, 1953 the very next day after the execution of the gift deed, Exhibit B-1, the plaintiff executed Exhibit B-2 in favour of his mother. This document is styled as a release deed. The document recites :

"Further I do not have any *huq* whatever in respect of all the properties remaining with you, either within your lifetime or after your lifetime. have executed (this deed) swearing upon Alla Rayul. I have no objection whatever in your taking the properties as you please."

This document Exhibit B-2 is strange, incongruous and abnormal.

Under Exhibit B-1 the plaintiff had already parted with all his properties and there was no necessity for a supplemental document to confirm it. The later document Exhibit B-2 purports to be a relinquishment on the part of the plaintiff of all his future rights, if any. It is unthinkable that a boy still in his teens with a long future before him should have renounced all his earthly possessions and also precluded himself from acquiring future proprietary rights.

On 1st January, 1954, the second defendant obtained a conveyance from the first defendant under Exhibit B-8 of the building and premises alone for an alleged consideration of Rs. 2,000. The document recites that an amount of Rs. 500 was received in cash on the date of execution and that Rs. 1,500 should be paid before the Sub-Registrar at the time of registration. On the same day the second defendant took a receipt Exhibit B-4 from the first defendant which recites that all the rice mill, machinery and plant had already been sold by her to him for a consideration of Rs. 5,900 of which a sum of Rs. 500 was to be adjusted by the second defendant

paying the lessee of the property the advance which he had given and the balance of Rs. 5,400. was received in cash on that date. These two documents Exhibits B-8 and B-4 are attested by Abdul Jabbar Sahib the brother of the first defendant.

On 4th February, 1954, the first defendant advanced a sum of Rs. 5,000 to one Nurunnisa Bi Ammal wife of Abdul Jabbar Sahib, on a mortgage of her properties embodied in Exhibit A-4. ; This document also is attested by Abdul Jabbar Sahib. The second defendant's contention is that this sum of Rs. 5,000 which the first defendant advanced to her Brother's wife was part of the sale proceeds which she got from him under Exhibits B-4 and B-8.

It is obvious that the plaintiff began to look round and then realised the full effect and fatuity of the transactions entered into by him with his mother. It is possible that having come to realise that he had been tricked into entering into these transactions by his uncle Jabbar Sahib, he became infuriated and wild. We find that on 16th June, 1954, Abdul Jabbar Sahib and several others sent a mahazar to the Sub-Inspector of Police, Tirupattur town, complaining against the acts of violence threatened by the plaintiff. The complaint was that the plaintiff was wandering in an unsound state of mind stating that he would stab his mother with a bitchuva. What happened as a result of this complaint is not apparent from the records. But it is stated in the plaint that the plaintiff was produced before the Sub-Magistrate of Tirupattur by the police but was discharged apparently because there was nothing to be enquired into. After the said incident the only thing that preceded the institution of the suit was the exchange of notices between the parties, Exhibit B-3 dated 9th August, 1954, being the notice on behalf of the plaintiff and Exhibit A-1 dated 17th August, 1954 and Exhibit A-2 dated 23rd August, 1954, being the replies sent on behalf of defendants 1 and 2 respectively.

The second defendant after his purchase from the first defendant took steps for eviction of the tenant Ramalingam Pillai in H.R.C. No. 5 of 1955 on the file of the District Munsif's Court of Tirupattur and obtained delivery of the property through Court on 22nd June, 1955. Thereafter curiously enough on 24th June, 1955, the second defendant again leased back the property to the very same Ramalingam Pillai for one year on a stipulated rent of Rs. 100 per month.

The circumstances in which the impugned documents Exhibits B-1 and B-2 came to be executed are deposed to by the plaintiff as P.W. 1. According to him his mother, the first defendant induced him to make the gift stating that she would be loyal to him and would not do anything which might cause prejudice and harm to her son. The plaintiff attempted to embellish his case by stating that he was shut up for five days by his mother and his uncle Jabbar Sahib and that he was given only water on those days. He admitted that he received a sum of Rs. 200 from his mother on one occasion and another sum of Rs. 100 on another occasion. He denied having taken his mother's jewels or sold them. He stated that the suit properties are worth at least Rs. 15,000.

The learned counsel appearing for the appellant rightly commented upon the fact that the story of duress and wrongful confinement was sheer after-thought there being no whisper or suggestion of it either in the notice that preceded the suit or in the plaint. We have no hesitation in rejecting this part of the plaintiff's case as it rests merely on his own words and as such a thing is wholly improbable and unlikely.

On the side of the defendants, D.W. 1, the scribe of Exhibits B-1 and B-2, was one of the witnesses examined. He is a professional document writer. He deposed that the documents were drafted by one Narayana Iyer, a stamp vendor, at the instance of the plaintiff himself and that he wrote according to the said draft. In cross-examination he stated that he did nothing except to write those documents and that he knew nothing else. D.W. 2 was an attestor of Exhibits B-1 and B-2. He has married the step-sister of the plaintiff. He deposed that the plaintiff brought both the documents and took his attestation in them. D. W. 3 was the first

defendant herself. She stated that the plaintiff took away all her jewels and squandered the proceeds that he used to go to Bombay and squander and come back, ask for funds and again go away. She said that she gave the plaintiff at first a sum of Rs. 1,000 and then again another sum of Rs. 2,000. She complained in the witness-box that the plaintiff was rude to her and beat her and ran away. She of course denied having placed him under lock and key or confined him before the transactions were entered into. Though he denied that her brother Jabbar was present at the time when Exhibits B-1 and B-2 were executed, she admitted that he was her "chief support and help". Jabbar Sahib himself was examined as D.W. 4. He said that he was not present when the gift deed was executed or registered. He completely dissociated himself from the transactions and he denied that he ever ill-treated the plaintiff. He admitted having signed Exhibit A-5, the complaint to the police and stated that he did so because the plaintiff was throwing stones and flourished a knife and threatened to stab him and others with it. He also said that he was misbehaving and ill-treating his mother by beating her and threatening her with a knife. The witnesses on the side of the defendants have given conflicting versions regarding the plaintiff's statement of objects and reasons for making the gift.

Two questions fall to be considered. The first is whether the gift and release deeds executed by the plaintiff in favour of the first defendant are vitiated by undue influence. The second is whether the second defendant, the alienee from the first defendant, is protected on the ground that he is a *bona fide* transferee for value, without notice of the circumstances affecting the impugned transactions.

Section 16 of the Indian Contract Act defines 'Undue Influence' in the following way:

"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another.

(*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872".

The section broadly embodies two classes of cases which cannot be described better than in the following words of Cotton, L.J., in *Allcard* v. *Skinner*[1].

"First where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

This case is an illustration of the second category of cases referred to therein. Transactions in the nature of bounty from a child to a parent are in equity regarded with great jealousy. Special relationships like parent and child, solicitor and client, doctor and patient, guardian and ward, spiritual adviser or clergyman and parishioner constitute 'protected classes' as they may be called, because the law

1. (1887) L.R. 36 Ch.D. 145 at 171.

throws a mantle of protection round them by raising a rebuttable presumption of undue influence.

> " If a gift is made to a parent or guardian, soon after the donor attains twentyone, the presumption is that the influence of the parent or guardian is still dominant, and the parental influence has been held to exist in the case of sons of twenty-five and twenty-three who resided with and were maintained by the father. The influence is deemed to exist in the language of the cases, until the child becomes emancipated." (Ashburner's Principles of Equity, 2nd Edition, page 302.)

The donee must show and the onus is upon him that the donor was either emancipated or was placed in a postion equivalent to emancipation by the possession of independent advice: *Powell* v. *Powell*[1]. Independent advice is not the only way in which the presumption can be rebutted. The donee must prove that the gift was the result of the free exercise of independent will. The Court must be satisfied that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing: *Inche Noriah* v. *Shaik Allie Bin Omar*[2].

The decision reported in *Lakshmi Doss* v. *Roop Loll*[3], is also in point. There it was held that there is a presumption of undue influence in cases of this description which is available in favour of the donor.

Mr. K. Krishnaswami Iyengar, learned counsel for the appellant, contended that the facts proved in the case are sufficient to show that the plaintiff acted voluntarily without pressure of any kind and imbued with the laudable motive of providing for his mother who did not get enough under the partition to sustain herself. He submitted that Jabbar was not present at the time when Exhibits B-1 and B-2 were executed, and that Narayana Iyer, the stamp vendor, in whom the plaintiff had confidence was present at that time and also attested the documents. He commented upon the fact that the plaintiff did not choose to examine this Narayana Iyer. According to the learned counsel the plaintiff having himself presented the documents for registration before the Sub-Registrar, and having taken them back himself from the office of the Sub-Registrar and handed them over to his mother and having thereafter lived with her amicably for some time no other inference can be drawn except that the plaintiff did every thing of his own volition without in any way being induced either by his mother or by his uncle. We are unable to accept this view. The mere existence of the fiduciary relation raises the presumption of undue influence and the Court will hold the transaction to be bad unless the presumption of undue influence is rebutted by cogent evidence adduced by the donee. We are satisfied that defendants 1 and 2 have failed to discharge the onus which rests upon them in this case.

A more improvident transaction from the point of view of the plaintiff it is difficult to conceive of. The transaction itself affords cogent evidence that the plaintiff was under the influence of his mother. The plaintiff had just come of age and there is no reason why he should give away all his properties to his mother. We agree with the finding of the learned Subordinate Judge that Exhibits B-1 and B-2 are vitiated by undue influence.

The position of the second defendant has now to be considered. Section 89 of the Trusts Act is also follows :—

> " *Advantage gained by exercise of undue influence.*—Where by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised muse hold the advantage for the benefit of the person whose interests have been so prejudiced."

Undue influence which undoubtedly operates against the first defendant will also operate against every volunteer who claims under her and also against any person who claims under her with notice of the equity thereby created or with notice of the circumstances from which the Court infers the equity. See *Bainbridge* v. *Browne*[4]. There is no doubt some evidence of the second defendant having paid

1. L.R. (1900) 1 Ch.D. 243.
2. L.R. (1929) A.C. 127.
3. (1907) 17 M.L.J. 19: I.L.R. 30 Mad. 169.
4. L.R. (1881) 18 Ch.D. 188.

consideration for the transactions evidenced by Exhibits B-4 and B-8. Some payments have been made before the Sub-Registrar as evidenced by the endorsements of payment found in Exhibits B-4 and B-8. It may be that the second defendant is not a mere volunteer. But it is difficult to believe that he was unaware of the circumstances under which Exhibits B-1 and B-2 came into existence. The evidence of the first defendant is that the second defendant is an old resident of the town (Tirupattur), that he lives in the street next to that in which she is living, and that he intimately knows her family affairs. He has purported to purchase the properties for an alleged consideration of Rs. 7,900. He himself has leased out the properties on a monthly rental of Rs. 100. Taking the annual income to be roughly Rs. 1,000 the value of the property must atleast be Rs. 15,000 which is the value as estimated by the plaintiff. The fact that the second defendant is an intimate friend of the first defendant's family, and the fact that he has purchased the property for a grossly inadequate price show that he cannot be a *bona fide* purchaser for value. We hold that the second defendant is a person affected with notice of taint that attaches to Exhibits B-1 and B-2.

The last contention urged by Mr. Krishnaswami Iyengar was that the mesne profits awarded by the Court below at the rate of Rs. 125 per month was excessive, and that the learned Subordinate Judge in any event failed to grant due allowance for expenses, payment of tax, licence fee, etc. This grievance on the part of the appellant is well founded. If necessary we would have remitted the matter to the Court below for a further enquiry. But the learned counsel appearing on both sides agree that the quantum of mesne profits may be fixed in a sum of Rs. 1,000 per year. In modification of the decree of the Court below regarding mesne profits we substitute the figure of Rs. 1,000 per year instead of Rs. 125 per month.

Subject to the modification mentioned above, the appeal fails and is dismissed with cost.

R.M. —————— *Appeal dismissed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Subbanna Gounder .. *Appellant.*

v.

Karuna V. Elliah Chettiar .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922) and Madras Cultivating Tenants' Protection Act (XXV of 1955)—Respective scope—If could apply simultaneously in respect of the same subject-matter.

The Madras City Tenants' Protection Act applies to tenancies of land for purposes of putting up a building thereon whereas the Madras Cultivating Tenants' Protection Act applies only to tenancies of agricultural land. It is not possible for both these enactments to apply to the same subject-matter. If the tenancy is one purely for agricultural purposes the Madras City Tenants' Protection Act will not apply even though a building has been put up thereon to facilitate agricultural operations. The Revenue Divisional Officer had jurisdiction to decide whether the tenancy was an agricultural one or not and on the basis of the decision, to direct eviction. The remedy of the tenant if any, is to approach the civil Court, in case the tenancy is not an agricultural one.

Petition under section 6-B of the Madras Act XXV of 1955 as amended by Act XIV of 1956 read with section 115, Civil Procedure Code, praying the High Court to revise the order of the Court of the Revenue Divisional Officer, Coimbatore, dated 11th February, 1960 and made in O.P. No. 138 of 1959.

S. Mohan Kumaramangalam and *S. Paramaswami* for Petitioner.

R. Gopalaswami Ayyangar and *Vedantam Srinivasan,* for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition under section 6-B of Act XXV of 1955 against an order passed for the eviction of the petitioners in O.P. No. 138 of 1959, on the file of the Revenue Divisional Officer, Coimbatore. The Respondent, who is the landlord, claimed *inter alia* that, as the petitioner had used a portion of the land

* C.R.P. No. 283 of 1960. 18th March, 1960. (28th Phalguna. 1881, Saka).

leased for agricultural operations for the purpose of putting a building and thus diverted the land to purposes unconnected with agriculture, he was liable to be evicted. The petitioner contended that the land was not taken on lease for agricultural purposes, but for the purpose of putting up buildings. The property leased is situate within the limits of the Coimbatore Municipality. The Madras City Tenants' Protection Act was extended to Coimbatore Town on 19th February, 1958. The petitioner pleaded that he had put up buildings on the property, and that he was entitled to the protection afforded by the enactment. The Revenue Divisional Officer, after considering elaborately the evidence adduced in the case, came to the conclusion that the lease was for agricultural purposes, and that the sheds were put up with a view to raise objections to eviction. He ordered eviction of the petitioner from the holding.

It is contended for the petitioner that, having regard to the fact that buildings have been put up on the land by the tenant, the Revenue Divisional Officer should have either dismissed the application for eviction, or given the relief to him under the Madras City Tenants' Protection Act. There is a misapprehension underlying the contention as to the scope and applicability of the Madras Cultivating Tenants' Protection Act and the Madras City Tenants' Protection Act. The former applies only to agricultural tenancies: the later for tenancies of land for the purpose of the tenant putting up a building thereon. It is not possible for these two enactments to apply to the same subject-matter. If the tenancy is one purely for agricultural purposes, the Madras City Tenants'. Protection Act will not apply even though a building to facilitate agricultural operations has been put up. If, on the other hand, the land is leased for the purpose of putting up a building by the tenant, the provisions of the Madras City Tenants' Protection Act might apply. The Revenue Divisional Officer has held that the tenancy is an agricultural one. This, he is entitled to find for the purpose of exercising the jurisdiction that is vested in him under Madras Act XXV of 1955. But the finding that the tenancy is agricultural is an incidental one, and it cannot be conclusive so as to operate as *res judicata* between the parties, if the petitioner were to raise the question as to the nature of the tenancy in a civil Court for obtaining relief under the Madras City Tenants' Protection Act. Suffice to say, that the Revenue Divisional Officer had jurisdiction to decide whether the tenancy was an agricultural one or not, and, on the basis of the decision, to direct eviction. The remedy of the tenant, if any, is to approach the civil Court, in case the tenancy is not an agricultural one.

The Civil Revision Petition is dismissed with costs.

R.M. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

A. B. Palani .. *Appellant**

v.

K. P. Ramaswami Mudaliar & Co., by
K. P. Kolandiappa Mudaliar and others .. *Respondents.*

Presidency Towns Insolvency Act (III of 1909), sections 9 and 10—Petition by creditor filed within three months of alienation by debtor—Application to implead alienee and to set aside alienation filed beyond three months—Competency—Notice served on alienee beyond three months—If bar to adjudication of debtor or to setting aside alienation—Presidency Towns Insolvency Rules (before amendment) Order 3 Rule 6-A—(Rule 9 of New Rules, 1958).

On 27th March, 1958, the respondent filed an application to adjudicate V, as an insolvent. Only the debtor was made a party to the petition according to rule 6-A of Order 3 of the Presidency Towns Insolvency Rules as the same stood before 1st July 1958. The allegation was that the debtor sold away his only available property to the appellant on 7th March, 1958, and that the alienation was fraudulent and intended to defeat and delay creditors including the respondent. On 30th June, 1958, an application was taken out for the addition of the alienee, appellant, as a party respondent and for setting aside the sale in his favour, according to rule 9 of the revised Insolvency Rules which came into force on 1st July, 1958.

* O.S.A. Nos. 51 and 52 of 1959. 17th February 1960.
(28th Magha, 1881, Saka).

The appellant pleaded that he was not liable to be added as a respondent because more than three months had elapsed since the date of the alienation in his favour and hence it could not be attacked in the pending insolvency petition.

Held: Once the insolvency petition has been filed in time, the subsequent dates on which notice of the petition is served on the alienee and other parties interested are not relevant. Because of delays in Court notice is not actually served on the alienee within three months of the expiry of the date of the alienation in his favour, it cannot be said that the alienee completely escapes from an attack on the validity of the alienation in his favour.

On appeal from the order of the Hon'ble Mr. Justice Subrahmanyam, dated 17th November, 1958 and made in the exercise of the Insolvency Jurisdiction of this Court in Application No. 312 of 1958 in I.P. No. 20 of 1958.

K. Kuppuswami, for Appellant.

M. Natesan, P. Ramanathan, P. Sivagnanam, C. Pitchaiah and The Official Assignee of Madras, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals arise out of a petition filed by one K. P. Ramaswami Mudaliar & Co., the contesting respondent before us, to adjudicate Venkataramanjulu Chetty insolvent. The petition was filed on 27th March, 1958. To that petition, as the rules stood at the time, only the debtor was made a party. It was alleged that the debtor had sold away his only available property, No. 40, Rottikara Thiruvengada Mudali Street, Choolai, for Rs. 25,000 on 7th March, 1958 and that the alienation was fraudulent and intended to defeat and delay creditors including the petitioning creditor. On 30th June, 1958, an application was taken out by the petitioning creditor for the addition of the alienee under the sale-deed as a party respondent and for setting aside the sale in his favour. Notice went on this application to the alienee Palani Mudaliar who raised the objection that he was not liable to be added as respondent because three months had elapsed since the date of the alienation in his favour and hence it could not be attacked in the pending insolvency petition. Subrahmanyam, J., who was the Judge sitting in insolvency overruled the objection and directed that the alienee be added as a party-respondent. He also allowed the insolvency petition to be amended to bring out clearly what was already contained in the original insolvency petition, *viz.*, the allegation that the alienation in favour of Palani Mudaliar was an act of insolvency. The learned Judge was of opinion that the application, dated 30th June, 1958, which prayed that the alienee may be added as a party, implied a request to the Court to order notice to the alienee and the prescribed rule in force at the time would substantially be satisfied. That Rule is Rule 6-A of Order 3 of the Presidency-Towns Insolvency Rules, Madras, before 1st July, 1958 and ran thus :

"When a petition alleges as an act of insolvency that any transfer by the debtor comes within the meaning of clauses (*a*), (*b*) or (*c*) of section 9 of the Act, notice of the petition shall be taken to the transferee under the transfer which is impeached."

The Insolvency Rules were revised and the revised rules came into force on and from 1st July, 1958. It is now provided in these rules that where a petition alleges as an act of insolvency a transfer by a debtor, the transferee should be impeached as a respondent to the petition. It is, therefore, clear that as the rule now stands the alienee should be made *eo nomine* a respondent and that is what the petitioning creditor sought by his application referred to above. O.S. Appeal No. 51 of 1959, is from this order of Subrahmanyam, J.

There was another application made by the petitioning-creditor, Application No. 14 of 1959, for permitting the petitioner to carry out the amendments in the petition. This petition related to the alienation in favour of the appellant. This application was disposed of by Rajagopala Ayyangar, J. As the learned Judge observed, and with respect we say rightly, this application is complementary to the previous application which had been ordered by Subrahmanyam, J. Again the alienee objected on the ground that more than three months had elapsed since the date of the alienation in his favour before the date on which he had been served with notice in the prior application, and *ex hypothesi* before the second application was taken out. The learned Judge felt himself bound by the order of Subrahmanyam, J., and further added that the difference between the old rule 6-A and

the present Rule 9 was merely procedural and when there is an order permitting the petitioning creditor to serve notice on the alienee, it logically follows that the petitioning creditor is entitled to an order formally impleading the alienee, to comply with the rules of 1958. The learned Judge accordingly ordered the application and permitted the amendment to be carried out. Against this order O.S. Appeal No. 52 of 1959 has been filed.

The main contention of Mr. K. Kuppuswami, learned counsel appearing for the appellant in the two appeals, was that on the expiry of three months from the alienation made by the debtor, it could not be attacked in any petition for adjudication of the debtor, though the insolvency petition itself was filed within three months from the date of the alienation, unless notice of such an application was served on the alienee before the expiry of three months. Learned counsel was unable to cite any authority for this position which we have no hesitation in holding is untenable. As the rule stood before 1st July, 1958, in an insolvency petition by a petitioning creditor, the only respondent contemplated is the debtor. But if an act of insolvency had been alleged in the petition, say an alienation, it was provided that notice should go to the alienee (Rule 6-A) of the insolvency petition, but the petition itself should only be deemed to be a petition against the debtor. Because the alienation was being attacked, notice was provided to enable the alienee, whose rights may be affected by any adverse decision of the Insolvency Court, to appear and plead his cause. Once the insolvency petition has been filed in time, we are not concerned with the subsequent dates on which notice of the petition is served on the alienees and other parties interested. Delays may occur over which the petitioning creditor may have no control and it surely cannot be said that because of delays in Court notice is not actually served on the alienee within three months of the expiry of the date of the alienation in his favour, he completely escapes from an attack on the validity of the sale in his favour. We agree with Subrahmanyam, J., and Rajagopala Ayyangar, J., that the appellant has no technical objection which can prevail. The appeals must, therefore, be dismissed.

It is not disputed that the appellant will be entitled to defend the alienation in his favour on the merits. He has really, therefore, no grievance.

There will be no order as to costs.

P.R.N. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Sellappa Goundan and others .. *Appellants**

v.

A. Bhaskaran and others .. *Respondents.*

Madras Estates (Supplementary) Act (XXX of 1956), *section* 7 (4)—*Scope of—Person aggrieved and not a party to the proceedings before the Tribunal—Right of appeal—Sections* 3 *and* 8—*Proceedings of a judicial nature—Non-ryotwari area—Whether an estate or not—Burden of proof on the State.*

Inam—What constitutes—Grant in consideration of money—Not an inam—Inam title-deed—No endorsement or abridgement of rights under the original grant.

Madras Estates Land Act (I of 1908), *section* 3 (2) (d)—*' Estate '—Original grant not an inam—Confirmation of half the grant only—Not an ' estate '.*

Section 7 (4) of Madras Act XXX of 1946 makes an adjudication by the Special Appellate Tribunal of the question whether a non-ryotwari area is or is not an 'estate', final and binding on all persons claiming an interest in the lands in such area, notwithstanding that any such person was not a party to the proceedings before the Tribunal. Section 6 of the Act enables a party interested, to appear and put forward his case before the Tribunal with a right of appeal. Section 7 of the Act confers a right of appeal on every person who may feel aggrieved by the order of the Tribunal. For the purpose of section 7 a person aggrieved would be one who has suffered a legal grievance by reason of the order and would comprehend a wider category of persons than those who were parties *eo nomine* before the Tribunal. A person whose right or title would be affected by the decision of the Tribunal would be a person aggrieved.

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* S.T.A. No. 52 of 1959. 17th December, 1959.
(26th Agrahayana, 1881, Saka).

The appellants are in possession of certain lands in the village claiming occupancy rights therein on the ground that the village of Komarapalayam is an estate. Their rights would be obviously affected by an adjudication under section 3 (6) of the Act. It would, therefore, follow that they would be persons aggrieved within the meaning of section 7 (1) and would be entitled to file an appeal against the order of the Tribunal notwithstanding the fact that they were not parties before the Tribunal.

The original grant by the Raja of Mysore in 1760 was no doubt rent-free but it lacked the essential element of an inam namely a benefaction. The grant, whether it be of the land, its assessment, or both was one made in consideration of payment by the grantee. It cannot be held to be an inam.

The circumstance that the grant was treated as an inam at the time of the inam settlement proceedings and title-deeds were issued on that basis cannot affect the original character of the grant. An inam title-deed does not operate either to enlarge or abridge the rights of the inamdars under the original grant.

It is necessary for the application of section 3 (2) (*a*) of Act I of 1908 that the original grant itself should have been an inam. It is not so in the instant case and therefore Inam Komarapalayam would not be an 'estate' within the meaning of Act I of 1908.

While the grantees were enjoying the entire village of Jagadapadi and its hamlets (Komarapalayam being one among these), Tippu Sultan took over nearly half of it confirming the Agraharamdars in their possession of the other half. The Inam Register extract refers to Tippu having confirmed the remaining lands as 'Ardha Manyam' village. Since in the present case the grant was wholly rent-free, Ardha Manyam in this case would signify that the grant was geographically half.

In the present case it cannot be said that there was a fresh grant in lieu of the unresumed portions, as the unresumed portion itself was confirmed both by Tippu and the British Government. Nor can it be said that it is a mere case of confirmation by Tippu of the original grant. His recognition of it as an Ardha Manyam village would suggest that it was a grant by him of half the village and the subsequent confirmation by the British Government being only of that grant it cannot be said to be a grant of a whole village.

Under section 8 of Act XXX of 1956 there would be a presumption in the case of an inam village that the grant was of melwaram alone and not both the warams. That presumption will not apply where the controversy is whether the grant was of an entire village. If such a question arises it has to be decided on the ordinary rules of evidence irrespective of the presumption under section 8 of Act XXX of 1956.

The proceedings under section 3 of Act XXX of 1956 are of a judicial nature and under the ordinary rules relating to burden of proof the onus would be on the State to prove that the grant was of the whole village since the State asserts affirmatively so.

In *Srinivasa Ayyangar* v. *State of Madras*, (1952) 2 M.L.J. 314; *Nana Thambi* v. *Perumal Chetty*, (1953) 1 M.L.J. 786; *Sitarama Sastry* v. *State of Andhra*, (1958) 1 An.W.R. 195 and *Ramamurthi Thiagarajan Chettiar* v. *State of Madras*, (1959) 1 M.L.J. 176; it has been held that the confirmation of only half the original grant could not bring the village within the definition of the term 'estate' under section 3 (2) (*a*) of Act I of 1908. The different view taken in W.A. No. 119 of 1956 considered.

Appeal against the decree of the Estates Abolition Tribunal, Vellore, in Original Application No. 18 of 1958.

R. Ramamurthi, for Appellants.

V. Vedantachari and *R. Mohan*, for Respondents.

The Order of the Court was made by

Ramachandra Iyer, J.—This appeal arises out of an order passed by the Estates Abolition Tribunal, Vellore, in O.A. No. 18 of 1958, declaring that the inam village of Komarapalayam in Tiruchengode Taluk of Salem District is not an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, 1908.

The appellants claim to be ryots in the village. Alleging that they were only holding under a lease which had expired, the inamdars filed O.S. No. 62 of 1955 in the District Munsif's Court, Sankari at Salem, for eviction and allied reliefs. The appellants resisted the claim of the inamdars pleading that they were entitled to occupancy rights in the lands as the village of Komarapalayam was an estate, and that the lands held by them were ryoti. While the suit was pending, respondents 1 and 2, two out of five co-sharer inamdars of the village, filed an application under section 3 (1) of Madras Act XXX of 1956 before the Estates Abolition Tribunal, Vellore, for a declaration that Komarapalayam village was not an estate as defined by section 3 (2) of Madras Act I of 1908. The appellants, however, were not made parties to the application, the 1st respondent herein, the State of Madras, being the only party. The Tribunal accepted the claim of the inamdars, and granted the declaration sought. Aggrieved by the declaration granted by the Tribunal, the

appellants have filed the present appeal, purporting to do so under section 7 of Madras Act XXX of 1956.

At the hearing of the appeal, the learned counsel for the respondents took a preliminary objection to the maintainability of the appeal. It was contended that the appellants who were not parties to the proceedings before the Tribunal, could not now challenge the decision. Reliance was placed on the provisions of section 6 to show that the appellants could, if they so chose, have appeared and put forward their case before the Tribunal, and that not having availed themselves of that opportunity, they should be held to be precluded from impugning the decision.

A right to appeal is a creature of statute. If under the provisions of a statute a person has a right to appeal, that right could not be denied to him for the reason that he might or could have put forward his case before the Tribunal in the first instance. Section 7 of the Act which provides for an appeal against the decision of the Tribunal states :

"7 (1) Against any such decision of the Tribunal, the State Government, within six months from the date of the decision, and any person aggrieved by such decision within two months from the said date, may appeal to a Special Appellate Tribunal, consisting of two Judges of the High Court nominated from time to time by the Chief Justice in that behalf, provided that the Special Appellate Tribunal may, in its discretion, allow further time not exceeding three months for the filing of such appeal.

(2) . . . .

(3) Subject to the decision on such appeal, the decision of the Tribunal shall be final and shall not be liable to be questioned in any Court of law.

(4) Every decision of the Special Appellate Tribunal and subject to such decision, every decision of the Tribunal shall be binding on all persons claiming an interest in any land in the non-ryotwari area concerned notwithstanding that any such person has not preferred any application or filed any statement or adduced any evidence or appeared or participated in the proceedings before the Tribunal or the Special Appellate Tribunal, as the case may be."

Sections 10 and 11 of Act XXX of 1956 vest the Tribunal with exclusive jurisdiction to decide the question, whether the non-ryotwari area is or is not an estate. Section 7 (4) makes an adjudication by the Special Appellate Tribunal, binding on all persons claiming an interest in any land in the non-ryotwari area concerned, notwithstanding that any such person was not a party to the proceedings before the Tribunal. In a case where there is no appeal to the Special Appellate Tribunal, the decision of the Tribunal itself would have a similar effect. Having regard to the finality attached to the decision of the Tribunal under section 7 (3) and (4), it is but appropriate that persons whose interests would be affected by the decision of the Tribunal should be given an opportunity to put forward their case. Sections 6 and 7 make provision for the purpose : (1) under section 6 it would be open to a party interested to appear and put forward his case before the Tribunal. The provision as to notice in that section is intended to apprise him of the proceedings pending before the Tribunal to enable him to safeguard his interests. If a person impleads himself as a party before the Tribunal, he would under the general law be entitled to appeal against any order in respect of which he might have a grievance: (2) In addition, a person affected by the order might also appeal. Section 7 confers a right of appeal on every person that may feel aggrieved by the order of the Tribunal (subject to the period of limitation prescribed by the section). For the purpose of section 7, a person aggrieved would be one who has suffered a legal grievance by reason of the order and would comprehend a wider category of persons than those who were parties *eo nomine* before the Tribunal. A person whose right or title would be affected by the decision of the Tribunal would be a person aggrieved. In the present case, the appellants are in possession of certain lands in the village claiming occupancy rights therein on the ground that the village of Komarapalayam is an estate. Their rights would obviously be affected by an adjudication under section 3 (6) of the Act. It would, therefore, follow that they would be persons aggrieved within the meaning of section 7 (1) and would be entitled to file an appeal against the order of the Tribunal, notwithstanding the fact that they were not parties before the Tribunal. We overrule the preliminary objection.

On the merits the question to be decided is, whether the village of Komarapalayam is an estate, as defined by section 3 (2) (*d*) of Madras Act I of 1908. The appellants' case is that it is a whole inam village which would be an estate. On the other hand, the inamdars' claim is that the village is only a part of a village granted in the year 1760 and would not, therefore, by itself be an inam village.

Section 3 (2) (*d*) of Madras Act I of 1908 runs as follows :

"Any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees.

Explanation (1) . . . .

Explanation (2) . . . .

Explanation (3). Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause. If the portion so resumed or any part thereof is subsequently regranted by the Government as an inam, such portion or part, shall from the date of such re-grant be regarded as forming part of the inam village for the purposes of this sub-clause."

Whether Komarapalayam village was an inam village or not would depend on the terms of the grant. The grant, however, is not in evidence. The copper plate grant which was produced at the time of the inam settlement proceedings is not now available. What we have is only Exhibit A-1 the extract from the Fair Inam Register relating to the village. From Exhibit A-1 it appears that in the year 1760, Krishna Raja Wadiyar, the Rajah of Mysore, granted the village of Jagadapady or Nattapatti, together with 12 hamlets, to certain Brahmins. Komarapalayam was one of the 12 hamlets. The grant, however, was not by way of gift of either the land or any portion of the assessment thereon. A number of Brahmins subscribed and collected a sum of 50,000 "Rajagopala pagodas". Four of them, who represented the others as well paid the amount into the treasury and obtained a grant of Jagadapady and the 12 hamlets rent free from the Ruler. Presumably, the grant was the result of the consideration paid by the grantees and was not really attributable to any benefaction by the Ruler. When Tippu Sultan came to power, he resumed six of the 12 hamlets, alllowing the successors of the original grantees to remain in possession of the rest without any obligation to pay rent on that portion of the village. On the assumption of sovereignty by the British, Captain Macleod confirmed the title on the successors of the grantees in regard to the lands in their possession. During the enquiry by the Inam Commission, it was found that the inam was enjoyed in 110 vrittis ; however only persons owning 90 vrittis appeared and filed the statements, and there was no claim for about 20 vrittis. The Inam Commissioner confirmed the inam, subject to an assessment of Rs. 566-11-3 in addition to the quit rent of Rs. 299-12-0. There is no evidence to indicate as to what happened to that portion of the grant which was taken over by Tippu Sultan.

Column 11 of the Inam Register Extract, describing the history of the grant, states :

"This was originally a sarva Agrahar obtained by four Brahmins from . . . . in Vikrama . . . . . . for 50,000 Rajagopala pagodas. Copper plates sanad is produced. Though four Brahmins purchased it the amount of sale was paid by subscription from a community of Brahmins who all divided the village according to their shares. It consisted according to the grantee of the kasba Jagadapady (or Nattapatti as is now called) and 12 hamlets. In Tippu's days, 6 of the hamlets were resumed and the remaining mostly was confirmed under the name of Ardhamanyam village. At the assumption of the company by the British, the Agraharamdars enjoyed the agrahar in 110 vrittis. In fasli 1205 two vrittis were zufted and some lands were also zufted as existing value of the moiety of the original grant. In fasli 1209 a fresh assumption took place and Captain Macleod confirmed as inam, Kasba Nattapatti, (2) hamlet Kuppandapalayam, (3) hamlet Komarapalayam, (4) Kullanayakampalayam, (5) Pudupalayam and (6) Chinnayyanayakampalayam. These 6 villages are enjoyed by the Agrahardars in 107-1/16 vrittis."

Column 12 states :

"Venkatramanyangar and Sesha Bhatta for consideration of 50,000 Rajagopala pagodas paid into the treasury. The grant comprised Jagadapady and 14 hamlets. The hariz of the village was stated at 5,000 pagodas a year, secondly a jari patta of Captain Macleod dated 24th June, 1801, in the name of the Agrahar community in 107-1/16 vrithis. It delands "the fields belonging to jari agrahar."

Column 21 states :

"The entire village is confirmed in one title-deed and enfranchised at the uniform rates of 1/8th for all shares. Total quit rent Rs. 369, the Government reversionary right being thus commuted. The Agrahardars will themselves arrange all the shares of absentees and get them registered hereafter according to enjoyment."

The Inam Register Extract shows that there were certain minor inams in the Komarapalayam village. Those inams were held by (1) Sri Damodaraswami temple, (2) Sri Kailasanathawami temple, (3) Sri Badrakali temple, (4) Sri Lakshminarayanaswami temple and (5) Sri Angaliamman temple. The minor inams were also confirmed at the inam settlement proceedings, and separate title-deeds were issued to the respective grantees. Exhibits A-2 to A-6 are the extracts from the Fair Inam Register relating to them.

Before a village can come within section 3 (2) (*d*) of Act I of 1908, there should have been a grant of that village in inam.

The term, 'inam' would imply a gift, whether it be of the land, its assessment or a portion thereof. In Wilson's Glossary, the term, 'inam' has been defined thus :

"In India, and especially in the South, and amongst the Mahrattas, the term was specially applied to grants of land held rent free, and in hereditary and perpetual occupation : the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assignment ; the term was also vaguely applied to grants of rent free land, without reference to perpetuity or any specified conditions."

In *Sundaram Ayyar* v. *Ramachandra Ayyar*[1], the word 'inam' was taken to mean a gift or benefaction and a gift by a superior to an inferior. In *Sam* v. *Ramalinga Mudaliar*[2] 'inam' was taken to mean a present or gift either to an individual or for public purpose, and that an inam implied a grant of land with a remission partial or total of the revenue. In *Lakshmana* v. *Venkateswaralu*[3] the Privy Council observed :

"Inam is a well-known word of 'arabic' origin which means reward or favour. The word came into use after Muhammadan conquest. In ancient days, grants of land or revenue, were made by Hindu sovereigns to individuals, particular families, or communities for various purposes or to religious institutions, for their upkeep. These were known as 'Manyams'."

Can it be said that the grant by the Raja of Mysore in 1760 which included Komarapalayam was an inam? It was no doubt rent-free. But the essential element of an inam, namely a benefaction, is lacking. The grant, whether it be of the land, its assessment or both, was one made in consideration of a payment by the grantee. It cannot be held to be an inam. The circumstance, that the grant was treated as an inam at the time of the inam settlement proceedings and title deeds were issued on that basis, cannot affect the original character of the grant. An inam title-deed does not operate either to enlarge or abridge the rights of the inamdars under the original grant. That apart, it is necessary for the application of section 3 (2) (*d*) that the original grant itself should have been in inam. Such, however, is not the case with respect to the grant in the instant case : therefore, inam Komarapalayam would not be an estate within the meaning of section 3 (2) (*d*) of the Estates Land Act.

The Estates Abolition Tribunal held that Komarapalayam was only a part or hamlet of the entire village of Jagadapady, and not being thus a whole village it could not be held to be an estate. Column 12 of Exhibit A-1 to which we have made reference, shows that Komarapalayam was only a hamlet attached to Jagadapady village. The learned counsel for the appellants contended that, as column 21 of Exhibit A-1 specifically referred to Komarapalayam as a village, it should be held that the grant comprised 13 independent villages, of which Komarapalayam was one. Much significance cannot, however, be attached to the specification of Komarapalayam as a village, as the entry in column 12 mentions it only as a hamlet.

1. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389.
2. (1916) 30 M.L.J. 600 : I.L.R. 40 Mad. 664.
3. (1949) 2 M.L.J. 500.

It is well known that hamlets are sometimes loosely called as villages. There is no other evidence in the case to indicate that Komarapalayam was a separate village at the time of the grant.

The position then is that, while the grantees were enjoying the entire village of Jagadapady and its hamlets, Tippu Sultan took over nearly half if it, confirming the Agraharamdars in their possession of the other half. The Inam Register Extract refers to Tippu having "confirmed" the remaining lands as 'ardha manyam' village. An ardha manyam would imply the grant of half the revenue. But in the present case it is not disputed that the grant was wholly rent-free. Ardha manyam would in this case therefore signify that the grant was geographically half. Exhibit A-1 states that "the remaining moiety was confirmed under the name of ardha manyam village". That would imply that (1) what was left with the inamdars was half a village and (2) that Tippu in effect granted that half and called it ardha manyam village. Captain Macleod affirmed what Tippu did. It is unnecessary to consider whether in the circumstances it could be held that there was any fresh grant by Captain Macleod, as Tippu's recognition of the village as an ardha manyam would amount to fresh grant, and not a mere recognition of the original grant of the year 1760. In *Nallathambi* v. *Perumal Chetty*[1]. the identity of a village originally granted disappeared as a result of resumption of a moiety: thereafter there was a grant by the British Government of scattered bits of land in lieu of the unresumed moiety of the original grant. It was held that there was neither confirmation nor recognition by the British Government of a grant of a whole village as such, and that the total extent of such portions could not be held to be an inam village. In the present case it cannot be said that there was a fresh grant in lieu of the unresumed portions, as the unresumed portion was confirmed both by Tippu and Captain Macleod. Nor can it be said that it is a mere case of confirmation by Tippu of the original grant. His recognition of it as an ardha manyam village would suggest that it was a grant by him of half the village, and the subsequent confirmation by the British Government being only of that grant, it cannot be said that to be a grant of a whole village.

The Tribunal has rested its conclusion on yet another ground, namely, the failure of the Government to prove that the grant was of an entire village, when there existed five minor inams therein. It does not appear from the records available whether the minor inams were granted before or after the major grant. If the former was not the case it might be that the minor inams might have been granted subsequently either by the Ruler who reserved that area to himself at the time of making the major grant or by the grantees after having got the entire village. If it were a case where the Ruler had reserved that area to himself, it cannot be said the major grant was of an entire village.

It was contended on behalf of the appellants that under section 8 of Act XXX of 1956 the burden of proof that an inam village was not an estate lay on the inamdars and it was for them to show that the grant was not of the entire village but that something was reserved. Section 8 of Act XXX of 1956 runs:

"In deciding the question whether any inam village or a separated part of an inam village was or was not an estate within the meaning of the Estates Land Act as it stood before the commencement of the Madras Estates Land (Third Amendment) Act, 1936 (Madras Act XVIII of 1936), it shall be presumed, until the contrary is proved, that such area or part was such an 'estate'."

This provision is similar to section 23 of the Madras Estates Land Act. The section postulates the existence of an inam village: if there is one such village, that is, an entire village, a presumption is provided for deciding whether the inam village was an estate before the Amendment Act of 1936 or one that became an estate thereafter, the presumption (rebuttable) being that it is the former. That is to say, there would be a presumption in the case of an inam village that the grant was of melwaram alone and not both melwaram and kudiwaram. That presumption will not apply where the controversy is whether the grant was of an entire village or part of a village. If such a question arises, it has to be decided on the ordinary rules of

1. (1953) 1 M.L.J. 786.

evidence irrespective of the presumption under section 8. In *Varadarajaswamivari Temple* v. *Govinda*[1], it was held that to an enquiry before a Settlement Officer under section 9 of the Madras Act XXVI of 1948 either initiated *suo motu* or on application by any party, the normal rule as to burden of proof applicable to the suits in a civil Court would not apply. The reason for the decision was that the proceedings before a Settlement Officer under section 9 of Act XXVI of 1948 were different in nature from those in a dispute in a civil Court. That principle will not apply to the case of an enquiry initiated under section 3 of Act XXX of 1956. The proceedings under section 3 are of a judicial nature and the ordinary rules of evidence, that is, those relating to the burden of proof, etc., would apply to them. In Halsbury's Laws of England, Volume 15 (Third edition), dealing with the question of onus of proof, it is stated at page 267 :

> " In legal proceedings the general rule is that he who asserts must prove : this proposition is sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue. This rule is derived from the Roman Law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative."

The reason for the rule is twofold : firstly that he who invokes the aid of law should prove his case, and secondly that a negative is more difficult to establish than the affirmative. In considering the question as to which of the two parties asserts the affirmative, regard must be had to the substance of the claim, and not to the form. There is nothing in the *Explanation* to section 3 (2) (*d*) of Madras Act I of 1908 to cast the onus of proof on the landlord. In *The District Board, Tanjore* v. *Noor Mohamed*[2] the Supreme Court proceeded on the assumption that the burden of proving that certain lands constituted an estate was upon the party who set up the contention.

It was contended on behalf of the appellants that the observations of the Supreme Court should be confined to the case where the jurisdiction of the civil Court was in dispute. Although the actual dispute in that case, related to the question of ouster of the civil Court's jurisdiction, the observations of the learned Judges could not be confined to those cases. The rule as to burden of proof is a rule of evidence applicable to all judicial proceedings. In *State of A. P.* v. *Battaru*[3] it was held that the burden lay upon the landlord to show that the grantor reserved some interest in the land and granted the minor inam subsequent to the named village. The reasons for the conclusion appears to be: (1) that the Legislature which enacted *Explanation* 1 to section 3 (2) (*d*) would not have contemplated to cast the initial onus on the tenant, as the general intention of the statute was to confer rights of occupancy on the tenants of inam villages, and (2) that the landlords would be in a more advantageous position to prove the case, as they would have in their possession records. With great respect to the learned Judges, we are of the view that neither of those considerations could modify the rule as to onus. In the present case the inamdars stated that Komarapalayam was not an estate. To place the onus upon him would be to require him to prove a negative : on the other hand, the case of the State is that it was an estate, and as such one or more of the tenancy legislations in the State would apply to the village. It is clear that it is the State that asserts the affirmative. It would, therefore, follow that the onus should be on the State to prove that the grant was of an entire village. The Tribunal held that the State has failed to discharge that onus. From the evidence available in the case it cannot be said that there has been any satisfactory proof that Komarapalayam was an entire village or even a named village at the time of the grant so as to come within section 3 (2) (*d*) of the Estates Land Act.

It was contended on behalf of the respondent that section 3 (2) (*d*) would not apply unless the entire grant was confirmed by the British Government and that as in the present case the confirmation related only to half of the original grant, it could not be said that there has been a confirmation of the grant. Reliance was

1. (1958) 2 M.L.J. 463.
2. (1952) 2 M.L.J. 586.
3. (1959) 2 An.W.R. 122 : A.I.R. 1959 A.P. 610 (F.B.).

placed in this connection on the decisions in *Srinivasa Ayyangar* v. *State of Madras*[1]; *Nallathambi* v. *Perumal Chetty*[2]; *Sivarama Sastry* v. *State*[3]; and *Karimuthu Thiagarajan Chettiar* v. *State of Madras*[4], where it was held that the confirmation of only half of the original grant could not bring the village within the definition of the term 'estate' under section 3 (2) (*d*). A different view has been taken in a recent decision of this Court in W.A. No. 119 of 1956. In that case an entire village was originally granted. Later, when the country came under the Mohammedan Nawabs, half of the village was taken by the Ruler and granted to a Darga. The Inam Commissioner recognised rights of both the grantees. It was held that, as regards a portion of the inam which was granted in favour of the representatives of the original grantee the village could be deemed to be an estate, while the grant by the Nawab in favour of the Darga relating only to half the village would not be an estate. It is unnecessary for the purpose of the present case to consider whether there is a conflict between the decisions referred to above and whether the matter should be referred to a Full Bench.

For the reasons stated already, we are of the view that the conclusion arrived at by the Tribunal is correct.

This appeal fails, and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Sri Chinnamuthu Kandar .. *Petitioner**

v.

Ganapathi Pillai *alias* Babu Raja Pillai and another .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 3—Jurisdiction of Revenue Court under—Warrant for possession for failure to pay the rent as agreed upon in a compromise in prior proceedings—Legality.

The provisions of section 3 of the Madras Cultivating Tenants' Protection Act enjoin on the Revenue Divisional Officer to hold a summary enquiry and pass appropriate orders in cases when a petition is filed under the section for eviction of a tenant on the ground of default in payment of rent. In the absence of an application under section 3 (4) (*a*) and in the absence of an enquiry the Revenue Divisional Officer will have no jurisdiction to pass an order for possession against a tenant on the basis of a compromise agreement arrived at between the landlord and tenant in previous proceedings which agreement went beyond the subject-matter of the proceedings themselves. The Revenue Divisional Officer will have no jurisdiction to execute a decree which embodies terms beyond the scope of the petition itself.

Petition under section 6-B of Act XXV of 1955, read with section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the Revenue Divisional Officer, Namakkal, dated 27th April, 1959 and made in C. T. P. A. No..... of 1959, in C.T.P.A. No. 21 of 1956.

V. Krishnan and *P. Veeraraghavan*, for Petitioner.

M. Ramachandran and *T. V. Balakrishnan*, for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is directed against an order for eviction, passed by the Revenue Divisional Officer, Namakkal, in C.T.P.A. No. 21 of 1956.

The tenant is the petitioner. The respondent-landlord applied to the Revenue Divisional Officer, Namakkal, in C.T.P.A. No. 21 of 1956, for eviction of the petitioner on the ground that he defaulted in the payment of rent. The petition came up for hearing on 6th August, 1956, when the parties entered into a compromise. The arrears of rent due to the respondent from 30th August, 1955 to 6th August, 1956, were ascertained, and, after remitting a portion thereof, the parties agreed that the peti-

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1. (1952) 2 M.L.J. 314.
2. (1953) 1 M.L.J. 786.
3. (1958) 1 An.W.R. 195.
4. (1959) 1 M.L.J. 176.

* C.R.P. No. 848 of 1959.

7th July, 1960. (16th Asadha, 1882—Saka).

tioner should pay a sum of Rs. 1,050 in two instalments of Rs. 500 and Rs. 550 on or before 6th September, 1956 and 6th October, 1956, respectively. There were also other terms to the compromise. Those terms recorded an agreement between the parties, by which the tenant was to be in possession of the land for a further period of three years, on an annual rent of Rs. 1,200. The agreement stipulated for the execution of a registered lease deed, embodying certain terms. The rent of Rs. 1,200 was to be paid in advance in two instalments. The first instalment of Rs. 600 was to be paid within four months from 6th August, 1956, and the second instalment of a like amount was to be paid by 6th February, 1957. The agreement also stipulated regular payment in advance of the two instalments of rent for the succeeding years and for delivery of possession on 6th August, 1959. In case of default, the tenant was to pay interest at 5½ per cent. per annum on the arrears. Finally, the agreement stipulated to this effect :

> "The counter-petitioner (tenant) should, within a period of one month and at his own expense, execute a lease deed. If there is a default in the payment of the amounts specified either on 6th September, 1956, or on the due dates mentioned above, the petitioner (landlord) will be entitled to take possession of the properties through Court. The counter-petitioner agrees to this."

The landlord, alleging that there was a default in the payment of the advance rent for February, 1959, applied to the Revenue Divisional Officer, Namakkal, for eviction, in terms of the memorandum of compromise. The Revenue Divisional Officer issued a warrant for delivery of possession. It may be noticed that C.T.P.A. No. 21 of 1956, was filed only for arrears of rent in regard to the year 1955-56. The terms of the compromise however referred to matters beyond the scope of the petition, in that it provided for a further lease for three years on certain terms and conditions and for eviction of the tenant, in case there was default in the regular payment of rent. It is not, however, known whether the parties entered into a registered lease arrangement, as contemplated in the terms. The tenant has challenged the jurisdiction of the Revenue Divisional Officer to pass the order for eviction. The compromise entered into on 6th August, 1956, though recorded by the Court in so far as it went beyond the scope of the application, was nothing more than an agreement between the parties. That agreement could not confer jurisdiction to the Revenue Divisional Officer to evict the tenant, regardless of the provisions of Act XXV of 1955. In case there was a default in the payment of rent, the remedy of the respondent would be to apply to the Court under section 4 of Act XXV of 1955 for eviction of the tenant. But what is contended for the respondent is that there is a lawful compromise, recorded in C.T.P. A. No. 21 of 1956, under which the Revenue Divisional Officer will have jurisdiction to pass the order for eviction. Section 3 of the Act states :—

> "No cultivating tenant shall be evicted from his holding or any part thereof, during the continuance of this Act, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise."

Section 3 (4) (*a*) provides for an application for eviction and the procedure to be adopted in the disposal of such an application. It is clear from the provisions of the section that the Revenue Divisional Officer should hold a summary enquiry into the matter and pass an appropriate order in the application. Therefore, there could be no eviction of the tenant, unless there has been an enquiry in an application made in that behalf as to whether there had been default in the payment of rent. In the present case, no application under section 3 (4) (*a*) for eviction was filed. There has been no enquiry either. The Revenue Divisional Officer treated the application as one for execution, and directed delivery of possession. The basis of the order was the compromise agreement, dated 6th August, 1956. In my opinion, that agreement, in so far as it went beyond the subject-matter of the application, namely, the arrears for the year 1955-56, cannot be held to confer jurisdiction on the Revenue Divisional Officer to execute the decree. The respondent could only apply for eviction, in accordance with the provisions of the Act.

The Civil Revision Petition succeeds, and is allowed with costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Messrs. Louis Dreyfus & Company Limited, 99, Armenian St., G.T., Madras. .. *Appellants**

v.

Messrs. V.S. Balasubbaraya Chettiar & Son, at Nos. 28 and 29, Coral Merchant Street, Madras ... *Respondents.*

Arbitration Act (X of 1940), section 30—Setting aside award under—Jurisdiction of Court—Limits.

The arbitrators in a reference under the Arbitration Act are the final judges of fact. It is not open to the Court in an application under section 30 of the Act to say that in its opinion the evidence was not sufficient to establish the conclusion. The power of the Court to examine the evidence is not as a Court of appeal but to find out whether the finding of the arbitrators is so perverse and unsupported by the evidence adduced before them so that it could be said that the arbitrators have misconducted themselves or the proceedings before them.

On appeal from the Judgment and Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 24th February, 1956 and made in exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 191-A of 1953.

The Advocate-General (*V. K. Tiruvenkatachari*) for M/s. *King* and *Partridge*, for Appellants.

V. C. Gopalaratnam and *V. Devarajan*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Iyer, J., setting aside an award made on the 25th of November, 1952, in the following circumstances. On 30th January, 1952, the respondents, a registered firm of yarn merchants carrying on business at Madras, agreed to buy from the appellant, Messrs. Louis Dreyfus and Co. Ltd., a company carrying on business at Madras ten bales of cotton yarn in hanks (2 cores) (XX) reels 1/80s combed Egyptian Warp Twist manufactured in Italy 5 lb. bundles, 50 bundles per bale at 187 *d.* per lb. C.I.F., Madras, in two lots of five bales each. By another contract the respondents agreed to buy seven more bales of the same kind of yarn at 180 *d.* per lb. C.I.F. On intimation received by the respondents that the said seventeen bales were due to arrive they paid for the drafts and obtained the respective bills of lading, took delivery on the 14th of April, 1952, of five bales, on the 8th May, 1952, another five bales and on the 12th May, 1952, the remaining seven bales. The respondents' case is that when they opened the bales delivered on the 14th of April, 1952 and examined the yarn contained in the bales they found that the yarn delivered was not according to the contract but was inferior and not fit for warp for handloom weaving. The respondents therefore claimed from the appellant-company damages for breach of warranty which they assessed in a sum of Rs. 10,224. The appellant-company denied their liability. In accordance with a clause in the contracts which provided for settlement of disputes and differences by arbitration, the respondents appointed one Mr. D.C. Lyth of Messrs. Gordon Woodroffe & Co., as arbitrator and the appellant-company appointed Mr. L.X. Pinto of Messrs. Rallis (India) Ltd., as arbitrator on their side. The arbitrators enquired into the claim. Oral and documentary evidence was adduced before the arbitrators who also heard arguments of the counsel on both sides. The arbitrators found that the yarn supplied by the appellant-company was of a type and quality consistent with the contracts and that the respondents were not entitled to recover any sum of money from the appellant-company as damages. They assessed the costs of the arbitration and award at Rs. 1,000 and directed the costs to be borne by the respondents.

The standard indent form of the appellant-company under which the respondent agreed to purchase yarn contained the following among other clauses :—

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*O.S. Appeal No. 60 of 1956. 12th February, 1960 (23rd Magha, 1881—Saka)

"Certificate of the I.C.I. (Institute Cotonieiro Italiano) will be final and binding on both buyers and sellers for the quality of the goods."

The appellant-company relied on test certificates issued by the said institute certifing that the contract goods bore the characteristics of upper Egyptian cotton yarn warp twist. The respondents relied on a certificate issued by the Government Textile Institute that the average lea-breaking strength of the yarn was 20 lbs. and also on the evidence of two handloom weavers who were the customers of the respondents to the effect that some of the yarn supplied to them through the respondents was found unsuitable for warp during the process of weaving.

The respondents' case was that the yarn delivered by the appellant-company under a previous contract had a lea-breaking strength of 26.3 lbs. The arbitrators found that there was no enforceable term in the contracts that yarn agreed to be delivered under the contracts would be of the same quality of yarn as previously delivered by the appellant to the respondents, that the respondents' contention that the yarn delivered was inferior to the stipulated quality in the contracts was not tenable, that the test certificates issued by the Institute Cotonierio Italiano showed that the yarn supplied was as per description in the contracts and that yarn with lea-breaking stength of 20 lbs. was being regularly used in India and in other markets for warp. The arbitrators were, therefore, of the unanimous opinion that the yarn supplied by the appellant-company was of a type and quality consistent with the contracts and that the claim made by the respondents was not sustainable.

The respondents filed a petition under sections 30, 31 and 33 of the Indian Arbitration Act praying that the said award may be set aside. Balakrishna Iyer, J., who finally heard and disposed of the petition held that the arbitrators assumed without proof that the certificates issued by the Institute Cotonierio Italiano related to the yarn actually shipped to Madras and that as the case went on the unproved assumption which went into the root of the matter the award should be set aside. The learned Judge accordingly set aside the award and also superseded the reference and directed that the arbitrators' agreement shall cease to have effect.

The test certificate issued by the Institute Cotoniero Italiano contained the following statement; (the extract is from one of them).

"The following survey operations have been performed by the surveyor of this Institute, Mr. Riccardo Orlandini on the following lot of yarn declared to constitute 5 bales;

* * * * *

Brand..........quality Upper Egyptian combed English count 1/80's twist warp,

Make-up :—Double cross reel in bundles or 5 lbs. (20 knots of 10 hanks of 1,680 yards each).

* * * * *

Two bales have been opened and examined and precisely those bearing serial numbers 7-10 and from them samples have been drawn for test of condition, count lea strength and............Tickets have been stuck on one side of all the five bales forming the lot; these tickets have been applied with wet seal of I.C.I.

Drawing of samples and also the survey tests have been carried out according to the rules laid down in the tables of U.N. I."

The results of the several tests carried out were set out and finally the opinion is thus given :—

"Following all these tests the Institute expresses the following opinion :—The lot possesses the characteristics of warp yarn Upper Egyptian combed."

There is a note that out of hanks drawn as samples and put into a cover which was sealed and signed both by the representative of the firm as also by the surveyor and that the sealed samples were left in the custody of the firm. The certificate refers to the inscription on the bales :—

Louis Dreyfus & Co., Ltd.,
1/80 Combed Egyptian Warp
5 lbs. nett.
Made in Italy,

and also the marks on each bale :—

S V B C	Madras 1/80s Made in Italy. Gross Weight. Nett weight.

The learned Judge considered that the evidence that the goods shipped to Madras were identical with the goods which had been tested by the surveyor of the Italian Institute was so little that it would be permissible to conclude that if the arbitrators had really applied their minds to the question they might well have come to a different conclusion. In the opinion of the learned Judge the fact that the bales examined by the Italian Institute bore the mark of the respondents' firm did not lead to the inference that the bales which were submitted for examination to the Institute were those actually shipped to Madras.

Tickets had been stuck on one side of all the bales forming the lot with the seal of the Italian Institute and the bales arrived with those tickets. As regards this the learned Judge says :—

"Now we do not know who stuck these tickets. This, however, is not very important. What is more important is that we do not know whether they were so stuck as to make it difficult or impossible for other yarn to be substituted in the bales. From the remark that the tickets had been stuck on one side of the bales the reasonable inference would be that they had not been so stuck as to make substitution difficult or impossible. A ticket stuck on a wrapper has not the same protective value as a seal so affixed as to make tampering difficult."

The conclusion of the learned Judge is thus expressed :—

"The arbitrators in the present case proceeded on an unproved assumption which goes to the root of the matter and substantially affects the justice of the case. The petition must, therefore, be allowed. The award is set aside."

Hence the above appeal.

The learned Advocate-General for the appellant-company contended that the learned Judge had no jurisdiction to set aside the award because there was no ground specified in section 30 of the Indian Arbitration Act estabished in this case. Section 30 is in these terms :—

"An award shall not be set aside except on one or more of the following grounds namely:—

(a) that the arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;

(c) that an award has been improperly procured or is otherwise invalid."

Admittedly grounds (b) and (c) would not avail the respondents. The only question is

"Have the arbitrators misconducted themselves or the proceedings ?"

The learned Judge posed the question thus :—

"Does the assumption of the arbitrators that the goods surveyed by the Italian Institute and the goods received in Madras were one and the same, constitute misconduct under section 30 of the Act ?"

He then referred to a decision of the Bombay High Court and answered the question in the affirmative. The learned Judge evidently relied on the observations in the decision that an arbitrator though not bound by the technical and strict rules of evidence must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. It was pointed out in that decision that an award should not be readily set aside unless the Court saw that there had been something radically wrong and vicious in the proceedings. There can be no quarrel with this statement of law but the learned Advocate-General contended that there was no legal misconduct committed by the arbitrators, that the question which arose for their decision was a pure question of fact on which they were entitled to come to a conclusion on the evidence adduced before them and even assuming that their finding was erroneous, that would not amount to misconduct in law.

There is considerable force in this contention. The only question before the arbitrators was whether the yarn supplied by the sellers, that is, the appellants, was of a type and quality stipulated in the contract. There is no doubt that the arbitrators dealt with this question. The appellant-compny relied on the certificates issued by the Institute Cotoniero Italiano and there was an express term in the contract that the certificate of the Institute will be final and binding on both the buyers and sellers for the quality of the goods. If the certificates related to the goods actually despatched to the respondents it would not be open to the buyers in the absence of proof of fraud to produce other evidence as regards the quality of the goods. What the learned Judge has held is that the arbitrators assumed, as though it were a matter which did not require proof, that the certificates related to the yarn actually shipped to Madras. We fail to see anything in the reasons given for the award to justify this finding. With respect to the learned Judge we think that this itself is an unproved assumption. Presumably it was contended before the arbitrators and the parties were represented by counsel that there was no proof that the yarn supplied was the yarn in respect of which the certificates were issued. It must not be overlooked that there was evidence before the arbitrators that the samples tested by the Institute were samples of the yarn relating to the contract with the respondents. It is mentioned in the certificate that each bale was found to bear the mark.

S
V B
C

These letters, it is common ground, stood for the name of the respondents V.S. Balasubbaraya Chettiar. Each bundle bore the inscription of the appellant-company, Louis Dreyfus & Co Ltd. The bales which arrived in Madras had tickets stuck on one side of the bales applied with the wet seal of the Italian Institute. These facts, in our opinion, would certainly constitute evidence on which the arbitrators could have been satisfied that the certificates related to the yarn actually supplied. The learned Judge says :

> " All that I am concerned to say is that the mere fact that tickets have been stuck on one side of the wrappings of the bales does not ensure that they have not been tampered with."

In the first place there was no evidence *prima facie* of any tampering. Apart from this we think that it was not open to the learned Judge to canvass the findings of the arbitrators as if he was sitting as a Court of appeal against their award.

There is also another aspect which may be mentioned. The evidence on which the respondents strongly relied in support of their case that the yarn supplied was not according to the contract stipulation, was a certificate issued by the Government Textile Institute. That it only to the effect that the lea-breaking strength of the specimens of yarn sent to the institute was about 20 lbs. There is nothing in the contract between the parties specifying the lea-breaking-strength of the yarn to be supplied. According to the respondents yarn of lea-breaking strength of 20 lbs. will not be suitable for warp. The arbitrators however, say that the yarn with a lea-breaking strength of 20 lbs. is regularly used in India and in other markets for warp. That apart, the certificate of the Italian Institute is that the samples tested by them possessed the characteristics of warp yarn upper Egyptian combed, and that is the quality specified in the contract, which also provides that the certificate of the Italian Institute will be final and binding on the parties for the quality of the goods. We have discussed all these facts and circumstances not in the way of an appellate Court which is entitled to examine the correctness of the finding of fact of a trial Court but only to see if the finding of the arbitrators can be said to be so perverse and unsupported by the evidence adduced before them that we can say that the arbitrators have misconducted themselves or the proceedings before them.

The arbitrators are the final judges of matters of fact. It is not open to the Court on application under section 30 of the Indian Arbitration Act to say that in the opinion of the Court evidence was not sufficient to establish the conclusion at

which the arbitrators arrived. It is not open to the Court to consider whether the conclusion of the arbitrators was right or wrong. It must be assumed that they considered all the evidence adduced before them. In the words of Day, J., in *Darlinton Wagon Company* v. *Harding and Trouville Pier and Steamboat Company*[1] :

> " We are not at liberty to investigate the evidence given in this case for the purpose of ascertaining whether the arbitrator came to a mistaken conclusion as regards either law or fact."

Section 1 of the Indian Evidence Act expressly says that the provisions of the Evidence Act do not apply to arbitration. It is true, however, that the arbitrators cannot act contrary to natural justice. In the Bombay case *Aboo Baker* v. *Congress Reception Committee*[2], referred to by the learned Judge all that was pointed out was that though an arbitrator is not bound by the technical and strict rules of evidence he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. The following observation of Cockburn, C.J., in *In re Hopper,*[3], was cited :—

> " I would observe that we must not be ever ready to set aside awards where the parties have agreed to abide by the decision of a Tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings."

Can it be said that the arbitrators in this case have disregarded any such fundamental rules of evidence ? Can it be said that there is something radically wrong and vicious in their proceedings? We think not. The question was whether the yarn supplied was according to the stipulated quality. There was a term in the contracts that the certificates of the Italian Institute would be final as regards quality of the goods. Such certificates were produced by the sellers and they were accepted by the arbitrators. The arbitrators also found that the buyers had not established affirmatively that the yarn supplied was not according to the stipulated quality. The arbitrators were entitled to come to their own conclusion on the evidence adduced before them and it is not open to the Court on an application under section 30 of the Indian Arbitration Act to examine the correctness of their conclusion. With respect to the learned trial Judge there is no warrant for holding that if the arbitrators had really applied their minds to the question they might well have come to a different conclusion. In our opinion the arbitrators had not misconducted themselves or the proceedings. The respondents have not established any of the grounds on which alone an award may be set aside under section 30 of the Indian Arbitration Act.

The appeal is, therefore, allowed and the respondents' application is dismissed with costs throughout.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Ramayya Nandiar and another .. *Appellants**

v.

Sri Swaminathaswami Devasthanam, Swamimalai, by Executive Officer Sri M. Paramasivan and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 29 (1) *and* 93—*Scope—Jurisdiction of Commissioner—Jurisdiction of Civil Court to decide—Validity of order.*

The procedure prescribed under section 29 of the Madras Hindu Religious and Charitable Endowments Act, 1951, has to be strictly followed by the Commissioner before according sanction under section 29 (1) of the Act. If the requirements of the Proviso as to notification, etc., is not followed the Commissioner will have no jurisdiction to make an order under sub-section (1).

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1. L.R. (1891) 1 Q.B. 245 at 247.
2. A.I.R. 1937 Bom. 410.
3. L.R. (1867) 2 Q.B. 367 at 375.

*S.A. No. 355 of 1958.

22nd July, 1960. (31st Asadha, 1882—Saka.)

Where an order has been made in conformity with section 29 (1) of the Act it may not be open to the civil Court to go into the merits of the order and decide about its propriety or otherwise. But it will be competent for the civil Court to see whether the power has been exercised in conformity with the provisions of the Act conferring such power. If the requirements of the statutory provisions have not been followed the order will be one without jurisdiction and as such void. The mere fact that an appeal has been provided for to a departmental authority will not bar the jurisdiction of the civil Court to find whether the requisites for the exercise of the jurisdiction have been complied with. Neither sub-section (4) of section 29 nor section 93 of the Act is a bar to the civil Court's jurisdiction to decide whether an order made under section 29 (1) of the Act is in compliance with the requirements of the Proviso to that sub-section.

D'Silva v. *Regional Transport Authority*, (1952) 1 M.L.J. 35 : I.L.R. (1952) Mad. 632, followed.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 113 of 1956 preferred against the decree of the Court of the District Munsif of Valangiman at Kumbakonam, in Original Suit No. 83 of 1956.

K. S. Desikan and *K. Raman*, for Appellant.

V. Krishnan and *P. Viraragavan*, for Respondents.

The Court delivered the following

JUDGMENT.—The question in the second appeal is whether it is not open to the civil Court to examine whether an order made under section 29 (1) of Madras Act (XIX of 1951) is not in conformity with the requirements prescribed in it. Disagreeing with the trial Court, the lower appellate Court held that there was no such jurisdiction in the civil Court and in that view allowed the appeal and dismissed the suit. The aggrieved plaintiffs have filed the second appeal.

The suit was filed by the plaintiffs as persons interested for a permanent injunction restraining the defendant temple from selling the suit lands. The suit lands are of an extent of one acre and 42 cents which were endowed by one Raghava Nandiar by a trust deed, dated 23rd November, 1914, for the performance of abishekam to Sri Swaminathaswami deity on the occasion of Skandasashti in the month of Arpasi each year at a cost of Rs. 5 and for feeding of one paradesi every day on a scale of half a Madras measure of rice. The donor first nominated Vasudeva Nandiar as a trustee to conduct the charity after his lifetime and provided that after the lifetime of Vasudeva Nandiar, the trustees of the temple should take over the property, manage the same and conduct the abishekam and charity. At the request of the trustees of the Devasthanam the Commissioner for the Hindu Religious and Charitable Endowments made an order, dated 19th July, 1954, permitting sale of the suit lands. It would appear that the sale was permitted on the ground that having regard to the situation of the lands they were uneconomic and it was inconvenient to manage the same by the temple trustees. By another order, dated 15th January, 1955, the Commissioner directed the trustees to invest the sale proceeds and to perform the charities out of the interest accrued. The plaintiffs who claim to be related to the original founder of the trust and to be persons interested in the performance thereof objected to the proposed sale contending that it would be a breach of trust and prayed for a permanent injunction restraining the defendant from selling the suit lands. The trial Court granted a decree as prayed for by the plaintiffs. But the lower appellate Court reversed the decree in the view that the provisions of sub-section (4) of section 29 and section 93 of Madras Act (XIX of 1951) barred the jurisdiction of the civil Court from examining whether the order of the Commissioner was in compliance with section.

All that we have in this case is the order in Exhibit B-1 dated 19th July, 1954: "Sanction accorded, as prayed for." The order shows that it was made on the application of the trustees of the defendant temple. On what grounds this order was made, there is no means of knowing. If any reasons were given for making the order, no copy thereof has been filed in the suit by the trustees. Apart from that, D.W. 1 giving evidence on behalf of the defendant temple admitted that no notification contemplated under the Proviso to section 29 (1) had been made. His evidence was that there was no notification calling for objection for the proposed sale.

It is the validity of that order that is challenged by the learned counsel for the appellant before me. He contended that a notification published in the prescribed manner inviting objections and suggestions with reference to the proposed sale was a condition precedent for the exercise of jurisdiction by the Commissioner under section 29 (1) and that unless this requirement was complied with, any order made under sub-section (1) would be void as one without jurisdiction. Section 29 (1) states that:

> "any exchange, sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to, or given or endowed for the purpose of, any religious institution shall be null and void unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution."

The Proviso to this section is material and runs thus:

> "Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in such manner as may be prescribed, inviting objections and suggestions with respect thereto; and all objections and suggestions received from the trustee or other persons having interest shall be duly considered by the Commissioner."

It is clear from this Proviso that before the Commissioner sanctions a sale, the particulars relating to the proposed sale should be published in the manner prescribed inviting objections and suggestions and he should consider them. As already stated, it is admitted by D.W. 1 that no such notification was made and no objections were called for and much less considered by the Commissioner before granting sanction for the sale. Obviously the procedure prescribed by the Proviso has to be strictly followed before the Commissioner can exercise his jurisdiction under sub-section (1) of section 29 and make an order thereunder permitting a sale. If the requirements of the Proviso are not complied with, in my opinion, the Commissioner will have no jurisdiction to make an order under sub-section (1). This is clear from the words "provided that before such sanction is accorded." In as much as the procedure provided by the Proviso to sub-section (1) of section 29 has not admittedly been followed, it seems to me that the order made by the Commissioner permitting the sale in this case was without jurisdiction and was void.

But the learned counsel for the respondent urged that in view of the provisions of sub-section (4) of section 29 which provided for an appeal to the Government within the prescribed time from an order made under sub-section (1) of section 29 and of the provision of section 93, the civil Court will have no jurisdiction to entertain the suit and go into the question whether the order of the Commissioner under sub-section (1) of section 29 was made in conformity with the requirements of that sub-section. I am unable to agree with this contention. It is true that when an order has been made in conformity with sub-section (1) of section 29, it may not be open to the civil Court to go into the merits of the order, review the circumstances and substitute for the Commissioner's order its own conclusions as to the propriety or otherwise of the order in relation to the existence or non-existence of necessity for or benefit to arise out of the proposed sale. But I think it is competent for the civil Court to see whether where a power has been entrusted to a statutory Tribunal or officer it has been exercised in conformity with the requirements of the provisions conferring such power. If the jurisdiction conferred is conditional upon a prescribed procedure being followed, and an order has been made in the purported exercise of that jurisdiction without following the procedure prescribed, in my opinion, the order so made will be one without jurisdiction and as such void. In such cases, the fact that an appeal has been provided to a departmental authority against an order made under section 29 (1) will not be a bar to the jurisdiction of the civil Court to enquire and find whether the requisites for the exercise of the jurisdiction have been complied with.

Nor can I see how section 93 acts as a bar to the civil Court enquiring into whether the order under section 29 (1) is in conformity with the provisions of that sub-section. It appears to me that section 93 does not have in its view a question such as the one under consideration, namely, whether even where the provisions of the Act have not been complied with which are required to be complied with,

before making an order, a civil Court will not be competent to investigate into and decide that question.... It would not have been open to the Commissioner himself to consider whether his own order was in conformity with the provisions of the Act. There is no provision made under section 29 for deciding whether once an order has been made under section 29 (1) or (4), it is in conformity with that section. Section 93 appears to contemplate only such an order as the Commissioner himself could make and not a question which the Commissioner is not empowered to enquire into and decide under section 29. In my opinion, neither sub-section (4) of section 29 nor section 93 of the Act is a bar to the civil Court deciding the question whether an order made under section 29 (1) was in compliance with the requirements of the Proviso to that sub-section.

It follows, therefore, that the order of the Commissioner for the Hindu Religious Endowments contained in Exhibit B-1 was void as it was one without jurisdiction. That being the case, there is no valid sanction under section 29 (1), for the proposed sale. The suit will, therefore, have to be decreed. But this does not mean that if as and when the trustees of the defendant temple get a valid and proper sanction under section 29 (1), they can in any way be prevented from selling the properties.

The second appeal is allowed. The judgment and the decree of the lower appellate Court are set aside, but, in the circumstances, there will be no order as to costs.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

Veeraswamy Reddy .. *Petitioner**

v.

Kanakkammal .. *Respondent.*

Limitation Act (IX of 1908), sections 9 and 13—Scope of—Mode of computing the period of limitation.

The proper way of reading sections 9 and 13 of the Limitation Act for purposes of ascertaining whether a suit is in time or not, is to first compute the interval between the date when the cause of action arose and the date when the suit was instituted. From this interval the time during which the defendant has been absent from India could be deducted by virtue of section 13 of the Limitation Act. If the resultant period does not exceed the time specified in column 3 of Schedule I of the Limitation Act the suit would be in time.

Narronji Bhimji v. *Mugniram Chandaji*, (1880) I.L.R. 6 Bom. 103, dissented from.

Hanmantram Sadhuram Pitty v. *Arthur Bowles*, (1884) I.L.R. 8 Bom. 561 and *Beake* v. *Davis*, (1882) I.L.R. 4 All. 530, referred.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Sholinghur, dated 15th November, 1958 and passed in S.C.S. No. 368 of 1958.

M. Srinivasachari and *V. Ratnam*, for Petitioner.

R. D. Indrasenan, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the petitioner. On 1st March, 1951, he executed a promissory note for Rs. 200 in favour of the plaintiff. Some two years thereafter the defendant left India for Ceylon and has not since come back. In July, 1958, the plaintiff filed a suit on the promissory note in the Court of the District Munsif of Sholingur. The defendant filed a written statement in which he contended that the suit note was not supported by consideration and that it was time-barred. The learned Munsif overruled these contentions and decreed the suit. The defendant has come to this Court in revision.

* C.R.P. No. 709 of 1959. — 21st June, 1960. (31st Jyaistha, 1882—Saka).

The first contention of Mr. Ratnam, the learned advocate for the petitioner, may be thus expressed. Though section 13 of the Limitation Act provides that in computing the period of limitation prescribed for a suit the time during which the defendant has been absent from India should be excluded, still section 9 enacts that when once time has begun to run no subsequent disability or inability to sue stops it. In the present case the promissory note was executed on 1st March, 1951. Time began to run immediately thereafter. The absence of the petitioner outside India did not by virtue of section 9 stop time from running. The suit was filed more than seven years after the promissory note was executed. The claim is therefore barred. In support of this contention he referred to the decision in *Narronji Bhimji* v. *Mugniram Chandaji*[1]. The material facts there were as follows. On 13th January, 1871 an agency account between the plaintiff and the defendant was adjusted in Bombay and on that date the defendant signed an entry in the account books of the plaintiff admitting his liability in a sum of Rs. 30,092-2-0. Thereafter the defendant left for the Nizam's Dominions and did not come back. The plaintiff instituted a suit to recover the money due to him in 1880. Bayley, J., held that the suit was time-barred. With respect to the learned Judge, I am unable to agree with his view of the matter. If that view were sound the statute would furnish debtors with a very facile way of avoiding payment of their debts. A person who borrows money in India and executes a promissory note has only to go to Ceylon or Malaya or some other place abroad and stay there for the requisite length of time and the debt which he has incurred would automatically get barred by limitation. That surely could not have been the intention of the provisions of section 13. As I understand the matter the proper way of reading sections 9 and 13 is this. When it has to be ascertained whether a suit is in time or not, the interval between the date when the cause of action arose and the date when the suit was instituted should be first computed. From that interval the time during which the defendant has been absent from India should be subtracted by virtue of section 13. If the resultant period does not exceed the time specified in column 3 of the First Schedule to the Act, the suit would be in time. I notice that in *Hanmantram Sadhuram Pity* v. *Arthur Bowles*[2], the decision of Bayley, J., in *Narronji Bhimji and others* v. *Mugniram Chandaji*[1], was dissented from. A Division Bench of the Allahabad High Court in *Beake & Co.* v. *Davis*[3], adopted the view which I am inclined to take. The Court observed :

> "It appears to us that section 13 of the Limitation Act is in no way affected or qualified by section 9 of the same Law and that its obvious scope and intention is to save the creditors subsequently suing their debtors, the period during which such debtors have been absent from British India."

The Bench expressly declined to follow the decision in *Narronji Bhimji and others* v. *Mugniram Chandaji*[1].

The second contention of Mr. Ratnam was that if the view for which he contended is not accepted then it must be held that the suit is premature. I am unable to agree here either. The plaintiff was entitled to sue on the promissory note the moment after it was executed. The journeys of the defendant or his absence from India did not affect his right to sue. The Limitation Act nowhere says that no suit may be filed when the defendant is outside India. Section 13 merely enables the plaintiff to wait if he is so inclined till the defendant comes back to India.

This revision petition fails and is dismissed with costs.

R.M. *Petition dismissed.*

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1. (1880) I.L.R. 6 Bom. 103.
2. (1884) I.L.R. 8 Bom. 561.
3. (1882) I.L.R. 4 All. 530.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASAN.

R. Kapanipathi Rao .. *Petitioner**

v.

T. Balakrishna Mehta .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7-A (4)—Procedure to be followed.

It is no doubt true that under section 7-A (4) of the Madras Buildings (Lease and Rent Control) Act, 1949, before action is taken under that sub-section it is the duty of the authority concerned to give due notice to the tenant to show sufficient cause why such an order should not be made. But where on an earlier occasion in the proceedings the tenant has been directed to pay the arrears which were overdue and the order was not complied with, it lay upon the tenant, if he desires to avoid an order for taking proceedings under section 7-A (4) of the Act, to appear before the Court and show cause why such an order should not be made.

Abdul Wahab v. *G. Dorairaj*, (1957) 1 M.L.J. (N.R.C.) 33, distinguished.

Petition under section 12-B of Madras Act XXV of 1949 and 115 of Act V of 1908 praying the High Court to revise the Order of the Court of Small Causes, Madras, dated 30th April, 1959 and made in H.R.A. No. 312 of 1958 confirming the order in H.R.C. No. 3558 of 1957 on the file of the Rent Controller, Madras.

Messrs. Pais, Lobo and *Alvares*, for Petitioner.

K. Srinivasan, K. Shanmugham, P. Viraraghavalu and *P. Venkataswami*, for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition is directed against the order dated 30th April, 1959, made by the Court of Small Causes, Madras, which appears to have been passed under section 7-A (4) of the Madras Buildings (Lease and Rent Control) Act. There was a petition filed before the Rent Controller for the eviction of the petitioner-tenant on the ground of default in the payment of rent and also on the ground of material alteration of premises. The petititon seems to have been allowed and the matter was taken up in appeal to the Court of Small Causes at Madras. In the meantime, the petitioner appears to have filed an application for the fixation of fair rent. The Controller fixed this fair rent at Rs. 225 per month as against the previous rent of Rs. 300 and this order was passed on 15th April, 1959. It is said that a revision is pending before this Court against that order. I am not at present concerned with it.

During the pendency of the appeal before the lower appellate Court, it seems to have been brought to the notice of the Court that the tenant who is under an obligation under section 7-A (1) of the Act to continue to make payments of the rent as they fell due had not so made any payment in respect of the months of December, 1958 and January and February, 1959. Thereupon an order was passed by the learned Judge on 23rd March, 1959, directing the payment of such arrears by 30th of April. On that date, when the case was called, it was found that the arrears had not been paid as directed. Accordingly the lower Court proceeded to stop the proceedings under section 7-A (4) and confirmed the order of the Rent Controller directing the eviction of the petitioner-tenant.

The principal argument that has been advanced before me is that while it is no doubt true that the tenant is under a liability to keep up the payment of the rents as they fell due, during the pendency of the proceedings, before the appellate authority makes an order stopping further proceedings and directing the tenant to put the landlord in possession of the building, due notice should be given to the tenant to show sufficient cause why such an order should not be made. Normally, I would have accepted that position, but for certain peculiar features which appear in this case. Had the matter been brought to the notice of the Court for the first time that the tenant was in arrears and had not complied with sub-clause (1) of section 7-A and if

* C.R.P. No. 1093 of 1959. 14th July, 1960. (23rd Asadha, 1882—Saka).

the Court thought that he could no longer be allowed to continue the proceedings and desired to make an order stopping the proceeding under sub-section (4), the appellate authority should normally call upon the party before it to show cause why such an order should not be passed. That will be in keeping with the principles of natural justice. But where it is seen that on an earlier occasion this tenant had been directed to pay the arrears, which were already overdue on that date, but the order of the Court was not complied with, it lay upon the tenant, if he desired to avoid any consequential order of stoppage of proceedings, to appear before Court and explain why such an order should not be made. The tenant did really have a notice of a proposed order under sub-section (4) by reason of the Court's direction made on 23rd March, 1959, directing the deposit of the arrears.

The case decided by Basheer Ahmed Sayeed, J., in *Abdul Waheb* v. *G. Dorairaj*[1], has been cited before me. The learned Judge therein observed thus in connection with a matter where the scope of sub-section (4) of section 7-A was in question.

"There is nothing on record to show that the tenant has been given any opportunity to show cause as to why he was not able to deposit the arrears of rent. There is no enquiry on that point. The order of eviction is therefore vitiated and there is failure of justice."

I have been at some pains to show that the present case differed from the facts of the one dealt with by Basheer Ahmed Sayeed, J., in that there was an opportunity given to the tenant. I would therefore hold that this decision has no application to the facts.

In the view that I have taken it is clear that the revision petition fails and it is dismissed with costs. Time to vacate 4 months.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Govinda Chettiar .. *Petitioner**

v.

Pachayappa Pandithar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (iii)—For purpose of a business which he is carrying on—Carrying on business—What is.

What constitutes 'carrying on business' is essentially a question of fact or a mixed question of fact and law and each case has to be decided on its own facts and no general proposition of law can be evolved. Even construing the term most liberally in favour of the landlord it cannot be said that the mere fact that a license has been obtained from the municipality to run a flour mill can by itself satisfy the pre-requisite condition to evict a tenant under section 7 (3) (iii) of the Madras Buildings (Lease and Rent Control) Act, 1949. When there is no evidence that the landlord has purchased the requisite machinery or plant for erecting a flour mill or has done any other business activity necessary to start a new venture the mere obtaining of a licence will not entitle the landlord to come within the requirements of law to evict the tenant.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Court of South Arcot, dated 5th August, 1958 and made in C.M.P. No. 185 of 1958 preferred against the Order in C.M.A.S. No. 9 of 1957 on the file of the Court of the Subordinate Judge of Cuddalore against the order in R.C.O.P. No. 12 of 1957 on the file of the Court of the District Munsif of Tindivanam.

K. Tirumalai, for Petitioner.

T. S. Ramaswami, for Respondent.

The Court delivered the following

JUDGMENT.—Govinda Chettiar, the owner of premises No. 79-A, Bazaar Street, Tindivanam, filed an application for eviction of his tenant Pachayappa Pandithar before the District Munsif of Tindivanam under the provisions of section 7 (3) (iii) of

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1. (1957) 1 M.L.J. (N.R.C.) 33 (C.R.P. No. 451 of 1956).

* C.R.P. No. 167 of 1959. 12th February, 1960.
(23rd Magha, 1881—Saka).

the Madras Buildings (Lease and Rent Control) Act, 1949. The premises was a non-residential building within the terms of the said Act and the tenant was carrying on the business of a barber shop therein. The tenant had executed a rental deed, dated 8th June, 1953, which was for a period of one year on a rental of Rs. 14 per month. The grounds on which the owner sought to evict the tenant were: (i) the tenant was in arrears of rent for a period of six months and 20 days and that there was wilful default in not paying the rent; (ii) that the tenant committed acts of waste by removing the door and the door-frame; and (iii) that the owner was carrying on business in flour milling and that the premises is required for locating his business.

The tenant resisted the application stating that there was no wilful default in the matter of payment of rent though he was admittedly in arrears as stated by the landlord. His case was that the landlord refused the money orders sent by him and therefore there was no wilful default on his part. He deposited the arrears due into Court after the filing of the application for eviction. The tenant further denied that he committed any act of waste on the premises, and that the removal of the door and the door-frame was only for convenient enjoyment of the premises in the course of conducting his business as barber shop. The tenant further stated that the landlord was not carrying on any business of flour mill, but that even if he wanted to do such business he had another site of his own wherein that business can be carried on.

The District Munsif of Tindivanam upholding the contentions of the tenant dismissed the application for eviction. The landlord preferred an appeal in the Sub-Court at Cuddalore in C.M.A. S. No. 9 of 1957 but was unsuccessful. He preferred a revision petition before the District Judge of South Arcot in C.M.P. No. 185 of 1958 but was again unsuccessful. Hence the above Civil Revision Petition by the aggrieved landlord.

The only ground now pressed before me by the learned counsel appearing for the petitioner is that the finding of the Courts below that the landlord had obtained a licence from the Cuddalore Municipality for the carrying on a flour mill business though in the name of the landlord's son was sufficient to enable the landlord to recover possession of the premises from the tenant under the provisions of the Madras Buildings (Lease and Rent Control) Act.

Section 7 (3) (iii) of the Act provides that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of the building in case of a non-residential building other than that used for the purpose of keeping a vehicle for purposes of a business which he is carrying on in a non-residential building not his own. The crucial question for determination is whether it can be said on the facts of the present case that the landlord is not occupying for purposes of a business which he is carrying on a non-residential building within the terms of section 7 (3) (iii) of the Act.

The contention on behalf of the petitioner is that the landlord having obtained a licence, the essential requisite for the purpose of carrying on a flour mill business has complied with the provisions of the Act. In this connection reliance is placed upon the decision of this Court in *Azimuddin Sahib* v. *RangaswamiPillai*[1]. In that case the landlord wanted the premises in order that he might trade in mill cloth in Salem. The landlord had obtained a licence for that purpose from the appropriate authorities. The learned Judge Balakrishna Ayyar, J., referred to the decisions in *Kesavan Nair* v. *Babu Naidu*[2], *Nataraja Asari* v. *Balasubramaniam*[3], and *Venkataswami & Sons* v. *Virabadraswami*[4], and held that the landlord can be said to be carrying on business under the terms of the Act so as to be able to evict the tenant.

In *Krishna Iyer* v. *Karur Vysia Bank*[5], Subrahmanyam, J., referred to the decision of Balakrishna Ayyar, J., in *Azimudeen Sahib* v. *Rangaswami Pillai*[1], and observed that that case marks the limit to which the law can go to enable the landlord to evict a tenant on the ground of requiring the premises for carrying on his own business. The

1. (1958) 2 M.L.J. 389.
2. (1954) 2 M.L.J. 149.
3. (1957) 2 M.L.J. 492.
4. (1955) An. W.R. 695.
5. (1959) 2 M.L.J. 215.

facts of the case decided by Subrahmanyam, J., only show that the landlord wanted the premises to start a coffee hotel business he not having any subsisting business on the date of the application, but having previously done business and stopped it for sometime for domestic reasons.

It is not possible to deduce any principle from the decisions referred to above which can afford a sure guidance for the proper interpretation of the word 'carrying on business' occurring in section 7 (3) (iii) of the Rent Control Act. As observed by Viswanatha Sastri, J., in *Venkataswami & Sons* v. *Virabadraswami*[1], there is no yard-stick by which the Court can measure the range of activities necessary to constitute the carrying on of a business. There are certainly stages in the activities of business and several steps have got to be taken even before a business is actually commenced. In the case decided in *Kesavan Nair* v. *Babu Naidu*[2], it was found that the landlord had invested large sums of money in purchasing machinery erecting buildings in the course of commencing a business and the only impediment was to obtain licence which could not be got until the tenant in hutment opposite to the factory premises could be evicted. The learned Judge Ramaswami, J., therefore, held rightly if I may say so with respect, that the landlord had satisfied the requirements of carrying on business when so much had been done by him in furtherance of the activities of the business.

What constitutes 'carrying on business' is essentially a question of fact or a mixed question of fact and law. Each case will have to be decided on its own facts and no general propositions of law can be evolved as to what constitutes 'carrying on business'. I am also of opinion as expressed by Subrahmanyam, J., that the decision in *Azimudeen Sahib* v. *Rangaswami Pillai*[3], really goes to the verge of the law.

I am of opinion that even construing the words 'carrying on business' most liberally in favour of any landlord it cannot be said that the mere fact that the landlord has obtained a licence to carry on a flour mill business from the Municipality can constitute in law the requisite for evicting the tenant. There is no evidence in this case that the landlord has purchased the requisite machinery or plant for erecting the flour mill or has done any other business activity necessary to start the venture. The mere obtaining of a licence will not entitle the landlord to come within the requirements of law to evict the tenant.

I agree with the Courts below that the landlord has failed to prove any ground for eviction. The Civil Revision Petition fails and is dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

The State of Madras represented by the Accommodation Controller, Madras .. *Petitioner**

v.

S. Natwarlal Davey .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 3 (5)—Scope of—Rent agreed upon—If parties could apply for fixation of fair rent.

It may be that ordinarily 'rent' will be one of the terms of tenancy agreed upon between the landlord and the State Government in respect of buildings taken over under section 3 (5) of the Madras Buildings (Lease and Rent Control) Act, 1949. But that does not mean that when once the landlord has agreed to a certain rent he is prevented from having recourse to an application for fixation of the fair rent. The first proviso to section 3 (5) of the Act takes out the question of rent from the operation of the main sub-section. The position under the sub-section is that where fair rent has been fixed for the building under the provisions of the Act then that is the only rent which is payable even if the State Government is the tenant. If no fair rent has been fixed it is open to the landlord to stipulate a rent and *per se* there is nothing invalid. But it is always open to the landlord and the tenant to file an application for fixation of fair rent before the appropriate forum.

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1. (1955) An.W.R. 695.
2. (1954) 2 M.L.J. 149.
3. (1958) 2 M.L.J. 389.

* C.R.P. No. 1090 of 1960.

29th July, 1960.
(7th Sravana, 1882—Saka).

(The appropriate forum in cases of requisitioned buildings pointed out—lacuna in the Act, *viz.*, lack of provision for appeal against the orders fixing fair rent under the sub-section pointed out).

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court (III Assistant Judge) Madras, dated 17th February, 1960 and made in O.P. No. 517 of 1959.

The Government Pleader, for Petitioner.

The Court made the following

ORDER.—Though the application for fixation of fair-rent was disposed of on the facts and this Court cannot interfere with the finding arrived at by the learned Judge regarding the quantum of fair rent, the learned Government Pleader has raised several interesting questions of law turning on the interpretation of section 3 (5) of the Madras Buildings (Lease and Rent Control) Act of 1949. His contention, if I understood him right, was that in the case of buildings taken over by the State under section 3 of the Act, there cannot be at any time any application for the fixation of fair rent. Section 3 (5) *inter alia* says that if the building is required for any of the purposes specified in sub-section (3) the landlord shall deliver possession of the building to the authorised officer and the State Government shall be deemed to be tenant of the landlord from the date on which the authorised officer received notice under sub-section (1) or sub-section (2). In such a case, the terms of the tenancy shall be such as may be agreed upon between the landlord and the tenant. In default of an agreement, the terms may be determined by the City Civil Court in the City of Madras and elsewhere by the Subordinate Judge's Court, and where there is no Subordinate Judge's Court, by the District Court. To this sub-section there are three provisos of which the first is the material one. It runs thus :

"Provided that the rent payable shall be the fair rent, if any, fixed for the building under the provisions of this Act ; and if no fair rent has been so fixed, such fair rent as may be determined by the Court aforesaid in accordance with the provisions of this Act."

The learned Government Pleader's contention was that this proviso has no application when the rent is agreed upon between the landlord and the tenant, that is, the State Government. This contention is evidently based upon the assumption that rent is one of the terms of the tenancy and the main sub-section declares that the terms of the tenancy would be such as may be agreed upon between the landlord and the State Government. According to him, once the rent has been agreed upon, it would not be open to the landlord to have recourse to an application for fixing of fair rent I am unable to agree with this contention. Assuming that ordinarily the rate of ren is one of the terms of the tenancy, the proviso specifically deals with that term and as the proviso has to be read in conjunction with the main sub-section, the result is that the proviso takes out the rent from the operation of the main sub-section. To give an instance, suppose the State Government in ignorance of a prior final order of the Controller fixing the fair rent for a building agrees with the landlord to pay rent at a higher rate, the logical result of the learned Government Pleader's argument will be that the State Government would be precluded from having resort to the Controller to get the fair rent fixed. The Government would be compelled to go on paying at the higher rate agreed upon, though it may be an unfair rent. I am clearly of opinion that this is not a correct interpretation of section 3 (5) read with the first proviso. The position is very simple. If fair rent has been fixed for the building concerned, under the provisions of the Act, then that is the only rent which is payable even when the State Government is the tenant. If no fair rent has been fixed but the landlord and the Government are agreed upon a particular rate of rent and the landlord continues to receive rent at that rate, then *per se* there is nothing invalid. But it will be always open to the landlord or the tenant to file an application for the fixation of fair rent if it is felt that the rent being paid is not a fair rent. Only in the case of buildings taken over by the State Government it is not the Controller who fixes the fair rent but the City Civil Court in the City of Madras and the Subordinate Judge's Court elsewhere, and where there is no such Court, the District Court.

There is, however, one lacuna in the Act, that is there is no provision for an appeal against an order of the City Civil Court or the Subordinate Judge's Court or the

District Court fixing fair rent. It is doubtful if any of these Courts would fall within the definition of Controller. In any event this may be clarified by Government when any amendments are undertaken at a subsequent date.

I find no ground on which I can interfere with the order of the learned Judge in this case. The Civil Revision Petition is dismissed.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(ORDINARY ORIGINAL CIVIL JURISDICTION).

PRESENT :—MR. JUSTICE JAGADISAN.

In the matter of Guardians and Wards Act VIII of 1890

and

In the matter of Lalitha Bai and others

V. Sampath Lakshmi, ... Guardian—Applicant*.

Guardian and Wards Act (VIII of 1890), section 27—Powers of the certificated guardian—Mother appointed as property guardian of male children—Expenses for the marriage of the sister of the minor sons—Court has no power to sanction to charge the minor sons' estate.

The certificated guardian of a minor has no power to incur expenses for the marriage of the minor ward's sister. An application though in form for payment out of moneys for such expenses is in effect one for sanction of a gift of a part of the minors' estate and cannot be granted by the Court:

The essence of the guardian's power is to act for purposes which are necessary, reasonable and proper for the benefit of the minor or for the purposes of realization, protection or benefit of the minor's estate. The guardian has no power to deal with the minors' estate on the ground of conferring a spritual benefit or bliss upon the minor.

Cases of joint family where the unmarried girls have a right in law to saddle the joint family property with their marriage expenses are clearly distinguishable.

A widow or other female heir under the Hindu Law holding a limited estate occupies a far different position from that of guardian of Court managing an infant's estate.

Application praying that the marriage of the applicant's minor daughter Lalitha Bai be sanctioned and the Court to direct the sale by the Manager, Reserve Bank of India, with the privity of the Registrar of this Court, of so much of the Government Securities standing to the credit of the account of the minors now in Court deposit in O.P. No. 30 of 1950 as would be sufficient to realise a sum of Rs. 3,000 (Rupees three thousand) and pay the same to the Guardian-Applicant for meeting the marriage expenses of the applicant's daughter.

R. Gopalaswamy Iyengar, for *M. V. Venkatesan*, for Applicant.

The Court delivered the following

JUDGMENT.—This is an application by V. Sampath Lakshmi, the property and personal guardian of her minor children: (1) Lalitha Bai, (2) Narayanan, (3) Lakshmanan, (4) Gita Kumari, (5) Gopal, (6) Mira Bai, (7) Ramani and (8) Kasturi, of whom five are her daughters and three are her sons, for sanction of the Court to have her minor daughter Lalitha Bai, the first named, married to her brother Satyamurthi, and for payment out of a sum of Rs. 3,000 from and out of the estate managed by her towards the marriage expenses of the contemplated marriage. She was appointed guardian by order of Court, dated 18th September, 1959, in O.P. No. 97 of 1959, on the file of the Original Side of this Court. Previously, her husband Venkatesan was appointed guardian of the property and person of some of the minor children in O.P. No. 30 of 1950. The two minor children, Ramani and Kasturi, were born to Venkatesan and Sampath Lakshmi after the order of Court in O.P. No. 30 of 1950 appointing Venkatesan as the guardian. Venkatesan died on 29th January, 1959 and Sampth Lakshmi was appointed in his place as the property and personal guardian of all the minor children referred to above. The properties now forming the subject-matter of O.P. No. 97 of 1959 and previously forming the subject-matter of O.P. No. 30 of 1950 belonged absolutely to Tiruvengadaswami Pillai, the father of the deceased Venkatesan who died leaving behind his last will and testament, dated 15th January, 1936, which was duly probated in O.P. No. 128 of 1937, on the file of this Court. The

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*Application No. 882 of 1960, in O.P. No. 97 of 1959. — 20th June, 1960. (30th Jaistha, 1882—Saka).

testator Tiruvengadaswami carved out only a life estate in all the properties forming the subject-matter of the bequest in favour of his son Venkatesan with a vested remainder in favour of the sons of Venkatesan. It is admitted in paragraph 3 of the petition in O.P. No. 97 of 1959 that the minor sons of Venkatesan and Sampath Lakshmi, *viz.*, Narayanan, Lakshmanan and Gopal are alone absolutely entitled to all the properties comprised in the will of the late Tiruvengadaswami Pillai and in the schedule of properties attached to the petition. The daughters of Venkatesan and Sampath Lakshmi have no manner of right or claim in the properties forming the subject-matter of the legacy in favour of the minor sons. It is also plain that the deceased Venkatesan did not make any acquisition of his own and that none of the items of properties forming the subject-matter of the guardian petition can be said to belong either to Venkatesan absolutely or to the joint family of Venkatesan and his minor sons. The minor sons of Venkatesan are the absolute legatees of the properties comprised in the guardian petition under the will of their late grandfather, owning the properties as tenants in common, each son being entitled to a third share of the properties. The position, therefore, is that Sampath Laskshmi, the Applicant herein, is functioning as the property guardian of her three minor sons above named, and as the personal guardian of all her children, male and female. She has been permitted to draw a sum of Rs. 100 per month from and out of the estate of the three minor sons for the upkeep, maintenance and education of the minor children.

The question for consideration is whether it is permissible for the property guardian of the estate of the three minor sons to spend the sum of Rs. 3,000 or any reasonable amount which the Court may sanction from and out of the minors' estate for the marriage of the minor girl, Lalitha Bai, the sister of the minor wards. The girl has attained marriageable age and she should be married in a manner befitting the social status and respectability of the family. There is no difficulty in the Court approving the choice of the bridegroom especially when the match is approved not merely by the personal guardian of the minor girl but also by the paternal grandmother of the minor and by the father of the guardian. In view of the supporting affidavit of S. Chandrasekharan and Padmavathi Ammal approving the marital alliance as proposed by the guardian, I accord sanction to the said marriage.

The payment of the sum of Rs. 3,000 prayed for by the property guardian can be ordered only if such payment is in accordance with the law governing the management by a Court guardian of the estate of the ward. The girl to be married is a sister of the wards whose property is being administered by the Court. The purpose of the expenses for which sanction of the Court is sought is very laudable and proper. It may be that if the minors themselves had today attained age, they would have been willing to celebrate the marriage of their sister by spending a sum of Rs. 3,000 which is not an unreasonable or excessive amount having regard to the total value of the estate belonging to the minors. But the Court cannot authorise such an expenditure if it is not within the competence of the property guardian to incur such expenses herself. Considerations of justice, equity and good conscience are really out of place in matters of this kind where the powers of the guardian are circumscribed both by statutory provisions and by the personal law governing the parties.

Sampath Lakshmi, the mother of the minors, is their natural guardian under the Hindu Law. She can do all acts which are reasonable and necessary for the protection and preservation of the minors' property and for the necessity and benefit of the minors themselves. The powers of a guardian of property are described thus by Trevelyan in his book "*The Law relating to Minors*" 5th edition, page 139 :

"Subject to the restrictions on the powers of testamentary guardians and of guardian of property appointed or declared by the Court, a guardian of property may do all acts which are reasonable and proper for the realisation, protection, and benefit of the property. The powers of a guardian are not co-extensive with those of a full owner. He is a trustee with powers of management occasionally enlarged by necessity. When he has been appointed by the Court under Act (VIII of 1890) his powers are limited by that Act..............................All transactions which guardians enter into on behalf of their wards must secure to the latter some demonstrable advantage, or avert some possible mischief in order to obtain recognition from the Court. They must show the strictest good-faith, and must be based on actual necessity and advantage and not on calculations of possible benefit."

The Judicial Committee in a very early decision in *Hunooman Persaud* v. *Mussummat Babooee*[1], described the position of the manager for an infant heir in a classical passage thus:

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate.......The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

What is necessity or benefit can never be exhaustively laid down and attempts in that direction by judicial pronouncements can at best be only construed as decisions on the facts and circumstances of each case. The dictum in the *Hunooman Persaud's case*[1] is the sacred fountain forming the source of the stream of subsequent case-law on the subject. But the decisions present a 'wilderness of single instances' from which it is difficult to extract any principle or rule of law.

Where a natural guardian is appointed as the certificated guardian under the provisions of the Guardians and Wards Act (VIII of 1890), as in the present case, the powers as natural guardian are no longer at large in view of the provisions of the Guardians and Wards Act which have become operative. Section 7 (2) of the Guardians and Wards Act provides:

"An order under the section shall imply the removal of any guardian who had not been appointed by will or other instrument or appointed or declared by the Court."

In *Arumugam Chetti* v. *Duraisinga Thevar*[2], it was held that the appointment of a guardian under the Guardians and Wards Act (VIII of 1890) has the effect of extinguishing the rights of the minors 'natural guardian', to deal with the minors' property. At page 42 it is observed:

"The position of a mother after the appointment of a guardian by Court appears to be no better. even though she may be guardian of the minor's person, as in this case."

The garb of a natural guardian falls off the moment he or she becomes a certificated guardian under the Guardians and Wards Act and it cannot be resumed by the certificated guardian for rehabilitating himself in the matter of exercising his functions and discharging his duties as such certificated guardian. Therefore, in the instant case, we have to look to the provisions of the Guardians and Wards Act to find out whether an application of this kind made by Sampath Lakshmi is sustainable or not.

The statutory provisions under the Guardians and Wards Act relating to the powers of the guradian of property are found in sections 27, 28 and 29 of the Act:

Section 27.—A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

Section 28.—Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

Section 29.—Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not without the previous permission of the Court;—

(*a*) mortgage or charge or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or

(*b*) lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

Even with regard to the powers of a natural guardian in a case where the natural guardian is not the certificated guardian and where no certificated guardian at all has been appointed by the Court in exercise of the powers under the Guardians and Wards Act, section 8 of the Hindu Minority and Guardianship Act (XXXII of 1956) has brought in statutory restrictions.

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1. (1856) 6 M.I.A. 393.
2. (1911) 21 M.L.J. 1077 : I.L.R. 37 Mad. 38.

It is as follows :—

"*Section* 8 (1).—The natural guardian of a Hindu minor has power, subject to the provisions of this section to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate ; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the Court,—

(*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(*b*) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(3) ....

(4) .... "

The essence of the guardian's power, whether it be as laid down by the Judicial Committee in *Hunooman Persad's case*[1], which has been consistently and uninformly followed throughout by all the High Courts, or it be the provisions of the Guardians and Wards Act, or the provisions of the Hindu Minority and Guardianship Act, is to enable the guardian to act for purposes which are necessary, reasonable and proper for the benefit of the minor or for the purposes of realisation, protection or benefit of the minor's estate. It is obvious that the guardian has no power to do anything to the prejudice of his ward. No act of the guardian can bind the ward and no act of the guardian can receive the approval of the Court, if it does not result in some advantage to the minor, actual or prospective, but material and real and not sentimental and illusory.

Mr. R. Gopalaswami Ayyangar, the learned counsel appearing for the applicant, contended that it was permissible for the guardian to incur such expenses from the estate to have the sister of the ward married, as the purpose can be termed to be one of legal necessity. He also contended alternatively that even if the purpose cannot satisfy the requirements of legal necessity, as the term is understood and interpreted by judicial pronouncements, it can yet be justified on the ground of spiritual necessity, as *kanyadana* will confer spiritual benefit on the minors. In support of these contentions, he mainly relied upon two decisions, the one reported in *Nandan Prasad* v. *Ajudhia Prasad*[2], and the other in *Krishnamachari* v. *Ramabhadran*[3]. In *Nandan Prasad* v. *Ajudhia Prasad*[2], there was a joint Hindu family consisting of two brothers and a sister, all of whom were minors. One minor brother borrowed a sum of money from a third party to provide for the marriage expenses of his sister who was 13 years of age. The minor borrower died and the lender sued the surviving brother to recover the sum advanced from the property of the joint family in his hands. The suit was resisted by the non-borrowing surviving brother on the ground that Brij Behari, the borrower was at the date of the loan a minor and that the contract was void. It was found as a fact that the cash advanced by the lender was duly applied for the reasonable and necessary expenses of the sister's marriage. The Allahabad High Court held that the borrowing by the minor bound the family estate and that the surviving brother should be made liable for the borrowing as he got the property by survivorship. At page 328, Piggott, J., observed as follows :—

" It may be conceded that by general principles of Hindu Law both Brij Behari Lal and the defendant, Ajudhia Prasad, lay under an obligation to provide out of the family property the funds necessary for performing the marriage ceremonies of their sister in a manner suitable to the social position of the family and the pecuniary resources."

At page 329, Piggot, J., further observed :

" I am satisfied that this argument is adequately met by the rejoinder that the loan was made to Brij Behari Lal as manager of the joint family, that it was virtually a loan to the family itself, and that Ajudhia Prasad was as much liable as his elder brother for the provision of the necessary expenses of the sister's marriage."

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1. (1856) 6 M.I.A. 393.
2. (1910) I.L.R. 32 All. 325 (F.B.).
3. (1952) 1 M.L.J. 665 : I.L.R. (1952) Mad. 318.

At page 331, there is this further observation :

> "On the whole, therefore, I am of opinion, that, though the present case is one very near the boundary line, it may fairly be said that the provision of the reasonable expenses for Musammat Genda Bibi's marriage was, at the time when the loan in question was taken, a matter of necessity for her minor brother."

At page 333, Stanley, C.J., observed :

> "Brij Behari and Ajudhia Prasad were under a legal obligation not merely to maintain their sister, but also to provide for the expenses of her marriage, and being under age were incapable of entering into a contract. It was as much obligatory upon them to provide for the expenses of their sister's marriage as it is obligatory on a lunatic to supply his wife and children with necessaries suitable to their condition in life.................The head of the family is bound to supply maintenance and marriage expenses for the daughters of the family, and money advanced to him for such an object may reasonably, I think, be regarded as money supplied for necessaries within the meaning of section 68."

In the Allahabad Case the cardinal fact is that the girl was entitled to be married at the expense of the joint family assets under the personal law governing the parties. The only complication besetting the case was the fact that the borrower happened to be a minor at the time when he borrowed. As the obligation that was incurred by him was one fastened upon the estate under the personal law, there was no difficulty in holding the estate liable in the hands of the surviving brother. That case cannot be an authority governing a case where the expenses of the marriage cannot be properly charged on the estate administered by the guardian. Cases of joint family where the unmarried girls have a right in law to saddle the estate with their marriage expenses are clearly distinguishable from the facts of the present case.

In *Krishnamachari* v. *Ramabhadran*[1], the question for consideration was whether a Hindu widow inheriting her husband's estate, or daughter inheriting her father's estate, can alienate the property for the purpose of incurring the marriage expenses of a daughter or a daughter's daughter of the family. Their Lordships held that *kanyadana* is an act of piety calculated to promote spiritual bliss and that a widow who incurred the expenses for the purpose of *kanyadana* of her daughter's daughter was promoting the spiritual bliss of her deceased husband and that therefore, she was competent to incur such expenses by alienating a portion of the properties. Satyanarayana Rao, J., observed at page 336 :

> "In case of marriages of the daughter's daughter or the daughter's grand-daughter, however, the alienations are supported on the ground that the gift of a destitute *kanya* in marriage is conducive to the spiritual welfare and confers spiritual merits on the last male owner as his funds are utilised for the performance of the marriage."

It is, however, unnecessary to refer to the observations contained in that judgment in detail as I am of opinion that a widow or other female heir under the Hindu Law holding a limited estate occupies a position far different from that of a guardian of Court managing an infant's estate.

A widow or other limited heir is not a tenant for life, or a trustee for the reversioner, but is an owner of the property inherited by her whose powers of disposal are however restricted. In *Janaki Ammal* v. *Narayanaswami*[2], the Judicial Committee stated thus :

> "Her right is of the nature of right to property, her possession is that of owner ; her powers in that character are, however, limited ; but so long as she is alive, no one has any vested interest in the succession."

It is true that a limited heir under the Hindu Law (female heir), the manager of a joint Hindu family, the guardian of a Hindu minor, the manager or dharmakartha of an idol in a temple or a shebait as is known in Bengal, have all been assigned by legal tradition the same powers of alienation and disposal over the property forming the subject-matter of their care, and that the dictum of the Judicial Committee in *Hunooman Persad Panday* v. *Mussumat Babooee*[3], is stated to be the measure of their power in this behalf. But so far as the widow's powers of alienation are concerned, the

1. (1952) 1 M.L.J. 665 : I.L.R. (1952) Mad. 318.
2. (1916) 31 M.L.J. 225 : L.R. 43 I.A. 207 : I.L.R. 39 Mad. 634 (P.C.).
3. (1856) 6 M.I.A. 393 (P.C.).

judicial decisions have made it clear that she can also alienate for religious or charitable purposes. These purposes have been divided into two classes, *viz.*, (*a*) purposes which are compulsory and obligatory like the performance of the obsequial ceremonies of the deceased owner, payment of his debts, etc. and (*b*) the performance of religious ceremonies which, though not essential and obligatory, may yet be deemed to be conducive to the spiritual welfare of the deceased owner. The Supreme Court of India in *Kamala Devi* v. *Bachu Lal Gupta*[1], summarised the case-law on the subject as follows at page 475 :

" On an examination of the decisions referred to above, the following principles clearly emerge (1) It is the imperative religious duty and a moral obligation of a father, mother or other guardian to give a girl in marriage to a suitable husband ; it is a duty which must be fulfilled to prevent degradation, and direct spiritual benefit is conferred upon the father by such a marriage. (2) A Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory but are still pious observances which conduce to the bliss of the deceased husband's soul. (3) In the case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it ; but for acts which are pious and which conduce to the bliss of the deceased husband's soul, she can alienate a reasonable portion of the property. (4) Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage are well recognised in Hindu Law. (5) If a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards in fulfilment of the promise. (6) Some decisions go to the length of holding that there is a moral or religious obligation of giving a portion of the joint family property for the benefit of the daughter and the son-in-law, and gift made long after the marriage may be supported upon the ground that the gift when made fulfils that moral or religioius obligation."

I am unable to see how the guardian administering the estate of a ward can deal with the estate on the ground of conferring spiritual benefit or welfare or bliss upon the minor. The duty of the guardian is to preserve the estate, augment its resources and manage it as best as he or she can, promoting the interests of the minor just as much as a prudent owner will manage his own property. The guardian has no right or duty to acquire or accumulate for the minor any store of spiritual welfare or benefit. Any analogy between the powers of a Hindu widow acting for the spiritual welfare of her husband and for her own spiritual welfare and the guardian of a minor's estate can only result in strange anomalies. Even the widow's powers in this respect are very restricted. She can act for a purpose conducive to the spiritual welfare of the husband, but she cannot act in order to acquire or confer upon her sole self any spiritual benefit. Punyasanchayana is indeed very meritorious and Hindu law givers have not ignored it even in relation to mundane matters. But I do not conceive it to be part of the guardian's duty to earn piety or spiritual bliss for the ward, in exchange or commutation of a portion of the estate however small or negligible it may be. Even benevolent acts may lose their odour of sanctity when they are sought to be done by dipping into the purse of others. Any recognition of power in the guardian to do acts of piety for and on behalf of the ward is fraught with danger as the Hindu law abounds in multitudes of pious acts and as pious guardians are many, not to speak of those who become attracted to piety for the nonce. I have no hesitation in overruling the contention of Mr. Gopalaswami Ayyangar based upon the doctrine of spiritual bliss drawn from the cases governing a widow's power of alienation.

The distinction between the legal capacity of a property guardian of a minor and a Hindu widow inheriting her husband's estate is well brought out in the following decision of this Court. In *Palani Ammal* v. *Kothandarama Goundar*[2], a Division Bench of this Court refused to uphold a deed of gift executed by the mother acting as the guardian of her minor son in favour of the minor's aunt in connection with her marriage. At page 433, their Lordships observe as follows :—

" It is now argued that what can be done by the manager of a family and what can be done by a widow in possession of the family properties can be done also by a widow as guardian of her infant son who is the owner of the properties. No authority has been cited which bears directly on this point. The learned Advocate-General has relied strongly upon *Ranaswami Aiyar* v. *Vengidaswami*[3]. A widow

1. (1957) 1 M.L.J. (S.C.) 66 : (1957) 1 An. W.R. (S.C.) 66 : (1957) S.C.J. 321 : 1957 S.C.R. 452 at 475 (S.C.).

2. (1943) 2 M.L.J. 432.

3. (1898) 8 M.L.J. 170 : I.L.R. 22 Mad. 113.

has full power to deal with the estate subject of course to the ordinary restrictions of a widow's right to alienate, but here the owner of the estate is not the widow at all but the plaintiffs. We see no reason why we should hold in the interests of a donee that a marriage gift which can be made by the manager of a joint family can also be made by the guardian of the only person now constituting the family. Such a gift can be validated only if it is made for purposes binding upon the minor. It is not contended there that the minor, had he been a major would have been compelled to make the gift. He could have pleased himself whether he made the gift or not,".

This decision was followed in *Rangaswami Iyer* v. *Marappa Goundan*[1], by Venkatarama Iyer, J., as he then was. The Mysore High Court also followed it in a decision reported in *Rama Setty* v. *Ibbanna Setty*[2].

The application in form is one for payment out of a sum of money to the guardian from and out of the estate. But in substance it is really an application for sanction of gift of part of the minors' estate for a specific purpose, *viz.*, the marriage of the sister of the minor wards. The certificated guardian has no such power and it will be beyond the competence of this Court to sanction an expediture which is not warranted in law. As stated already, the Court should not be swayed by considerations of propriety or the meritorious nature of the object of the expenses, as the Court in which the property is vested and which is acting through the medium of its manager, or delegate, the property guardian, owes a duty to the minor wards to administer the estate in accordance with the law of the territory. The result may be unfortunate but is one which cannot possibly be helped. I hold that the Court has no power to sanction an ex-gratia payment from out of the minor's estate even for the marriage of the minors' sister, in the instant case. I therefore disallow the guardian's prayer for payment out.

In the result, the application is dismissed.

V.S. — *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE JAGADISAN.

P. K. Muthuvelappa Goundar .. *Petitioner**

v.

The Deputy Registrar of Co-operative Societies, Coimbatore and others .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), section 51—"Dispute touching the business of a registered society"—Meaning of—Question as to validity of nomination of candidate for election to Board of Directors—Jurisdiction of Registrar to decide.

Interpretation of Statutes—Directory and mandatory provisions—Test to distinguish—Rules of construction.

Constitution of India (1950), Article 226—Jurisdiction of High Court to issue writs—Existence of other remedy—If a bar—Error apparent on the face of order of subordinate Tribunal—If ground for quashing order.

The validity of the nomination of a candidate for election to the Board of Directors of a registered society is a "dispute touching the business" of the society within the meaning of section 51 of the Madras Co-operative Societies Act, 1932. It cannot be said that though the election of directors as such will constitute such a dispute if the election is impugned by anyone, the stage of nomination of a candidate for election is different and a dispute as to the validity of the nomination cannot fall under section 51. It is not possible to dissociate the stage of nomination from the stage of return of the candidate after polling and declaration of results, in such a manner as to import the notion of "business" of a society only to the latter stage of election and not to the former stage of nomination.

Madhava Rao v. *Surya Rao*, (1953) 2 M.L.J. 340 : I.L.R. (1953) Mad. 1047 (F.B.), followed.

The word "election" means the entire process which consists of several stages and embraces many steps some of which may have an important bearing on the result of the process.

Ponnuswami v. *Returning Officer, Namakkal*, (1952) S.C.J. 100 : (1952) 1 M.L.J. (S.C.) 775 : (1952) S.C.R. 218, relied on.

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1. (1952) 2 M.L.J. 506. 2. A.I.R. 1954 Mysore 56.

*W.P. No. 1105 of 1959. 19th January, 1960. (29th Pausa, 1881, Saka).

The distinction between absolute and directory enactments or mandatory and recommendatory provisions, rules and regulations is well known and cannot admit of any doubt. The contravention of an absolute enactment renders the resulting act invalid and void, while non-compliance with a directory enactment leaves the validity of the thing done untouched. An absolute enactment must be obeyed fully or fulfilled exactly. But it is sufficient if a directory enactment be obeyed or fulfilled substantially.

The primary thing to be considered in determining whether a provision is mandatory or directory, is of course, the language of the enactment or rules, but care must be taken not to unduly stress the language. The proper approach is that the Court must, without ignoring the plain words of the enactment or rule, have regard to the scope, object, scheme, context and design of the Act and the purpose for which the Act or rule is intended.

Woodward v. *Sarsons*, L.R. (1875) 10 C.P. 733 ; *Rex* v. *Nat-Bell Liquors, Ltd.*, L.R. (1922) A.C. 128; *Liverpool Bank* v. *Turner*, 30 L.J. Ch. 379 ; *Howard* v. *Bodington*, 2 Prob. Div. 211 ; *Punjab Co-operative Bank* v. *I.T.O., Lahore*, (1941). 1 M.L.J. 130 : L.R. 67 I.A. 464; *Thakur Pratap Singh* v. *Shori Krishna Gupta and others*, 1956 S.C.J. 143 : (1955) 2 S.C.R. 1029, referred to.

The use of the word " shall " though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid.

State of Uttar Pradesh v. *Manbodhan Lal*, (1958) S.C.J. 150 : (1958) M.L.J. (Crl.) 85 : (1958) S.C.R. 533 : A.I.R. 1957 S.C. 912, relied on.

Provisions fixing the time for performance of acts are ordinarily held directory where there are no words prohibiting the doing of the thing after the time specified and there is no penalty for the delay.

Maxwell on " Interpretation of Statute "; 10th edition, page 381 ; Crawford on " Statutory Construction ", pages 515, 535, 536 ; Graies on " Statute Law ", page 346, cited.

Phillips v. *Goff*, L.R. (1886) 17 Q.B.D. 805, relied on.

Rule 4 of the Election Rules framed by the Coimbatore District Co-operative Bank, Ltd., under the powers conferred by bye-laws provided :—

Voters' List.—"In the year of election before the 10th October, as soon as the particulars regardings the delegates are received from the societies, a list has to be prepared with reference to the delegate and individual shareholders. This shall be the " voters' list " Before the 20th October of the election year, the list of voters must be prepared, signed by the secretary and published in the Notice Board of the Bank. A copy of the said list has to be supplied to any voter found therein on a payment of Rs. 10 per copy."

Rule 5, after providing for the filing of the nomination in a particular form, etc., *inter alia*, provided : " From the 25th to 28th October of the election year, from 11 A.M. to 3 P.M. on each day the nomination paper has to be submitted to the Secretary."

Held, on a construction of the rules ; Rule 4 does not contain any provision by way of a penalty in case the time-limit for return of the delegate is not strictly adhered to and the provision fixing a time limit must be held to be merely a directory provision for the convenience of orderly election and cannot and was not intended to operate as a dead line preventing the Bank from recognising and accepting delegates beyond the time and consequently disfranchising the member society from participating in the delegates' election.

The jurisdiction of the High Court under Article 226 of the Constitution may properly be invoked in cases where the order of the subordinate Tribunal is vitiated by error of law apparent on the face of the record, and the impugned order quashed. The fact that there is an adequate alternative remedy cannot be a bar to the issue of a writ

The availability of other remedies to the aggrieved party may weigh with the High Courts in refusing a writ under Article 226, but it cannot disentitle him to get the relief or preclude the Court from issuing the writ. However convenient or expedient it may be to dismiss a writ petition before issuing a rule *nisi* on the ground of a subsisting alternative remedy, it may not always be just to do so at the final stage, when the parties have incurred all the expenses and the Court has gone into the matter fully.

Official Receiver, Guntur v. *Seshayya*, (1940) 2 M.L.J. 860, applied.

Rashi & Son v. *Income-tax Investigation Commission*, (1954) S.C.J. 264 : (1954) S.C.R. 738; *N. T. Veluswami Thevar* v. *G. Raja Nainar and others*, (1959) 2 M.L.J. 48, referred to.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the order of the 1st Respondent, dated 1st December, 1958, in A.R.C. No. 140 of 1959 and quash the said order, dated 1st December, 1959 and made therein.

The Advocate-General (*V. K. Thiruvenkatachari*) and *T. Martin*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), *P. S. Kailasam*, *S. Sethuratnam* and *S. Ramalingam*, for Respondents.

The Court made the following

ORDER.—This writ petition prays for the issue of a writ of *certiorari* or other appropriate writ, direction or order for quashing the order of the Deputy Registrar of Co-operative Societies, Coimbatore, dated 1st December, 1959, in A.R.C. No. 140 of 1959 under the following circumstances :

The Coimbatore District Co-operative Central Bank, Ltd., is a registered Society governed by the Madras Co-operative Societies Act (VI of 1932). It will be hereinafter referred to as the Central Bank. The General Body of Central Bank consists of the following members : (I) individual members ; (ii) affiliated societies ; (iii) the State Co-operative Bank, Ltd., and (iv) the State Government if they held shares in the Bank. Bye-law No. 8 of the Central Bank provides that each society being a member of the Central Bank shall at a general meeting appoint a delegate who shall hold office for a period of three years or until his successor shall have been appointed in accordance with the rules governing such appointment. Under bye-law No. 11 the management of the Central Bank shall vest in a Board consisting of several persons of whom delegates from several constituencies shall also form part. One such constituency is styled as 'Audit Union and Urban Banks affiliated to the Central Bank'. Bye-law No. 11, clause (2), provides as follows :

" . . . . . . The election of these representatives shall be held at separate meetings composed exclusively of the delegates of the respective classes of societies and specially convened for the purpose from among themselves. The President of the Central Bank shall preside over such meetings, and he shall have no right to vote unless he is a delegate from any of the types of societies referred to. In the event of an equality of votes the matter shall be decided on the spot, by the casting of lots ".

For the purposes of the present case what need be noted is that each of the constituencies mentioned in bye-law No. 11, clause (2), has a right to send a delegate to the Board of Management of the Central Bank and the mode of choosing such delegate shall be by election as amongst delegates of each such constituency.

Bye-law No. 14 is as follows :—

" The entire administration of the Central Bank shall vest in the Board of Management. The Board shall be competent to make regulations from time to time not inconsistent with the bye-laws of the Co-operative Societies Act (VI of 1932) (Madras) and the rules made thereunder for the conduct of the business of the Central Bank. A copy of such regulations shall be furnished to the Registrar of Co-operative Societies for information ".

In exercise of the powers conferred under bye-law 14 rules were framed for the conduct of elections and the said rules shall hereinafter be referred to as the election rules. It will be convenient to set out some of the relevant elections rules at this stage.

Rule 4: " *Voters' List* : In the year of election before the 10th October, as soon as the particulars regarding the delegates are received from the Societies, a list has to be prepared with reference to the delegates and individual shareholders. This shall be the 'voters list'. Before the 20th of October of the election year, the list of voters must be prepared, signed by the Secretary and published in the Notice Board of the Bank. A copy of the said list has to be supplied to any voter found therein on a payment of Rs. 10 per copy ".

Rule 5: " *Nomination* : The candidate for the Board of Management has to file his application under Form No. 1, which has to be signed by the candidate, his proposer and seconder. The candidate, his proposer and seconder must be persons found in the voters' list so prepared. All the three must be from out of the said voters' list. From the 25th to 28th October of the election year, from 11 A.M. to 3 P.M. on each day, the nomination paper has to be submitted to the Secretary ".

The constituency of 'the Audit Union and Urban Banks affiliated to the Central Bank' consists of, amongst other societies, two societies (i) the Gobichettipalayam Co-operative Urban Bank, Ltd., and (ii) the Coimbatore City Co-operative Bank, Ltd. The Central Bank passed a resolution on 8th September, 1959 and issued a circular on 9th September, 1959, to all the affiliated societies drawing their attention to submit the names of their respective delegates on or before 10th October, 1959, with a view to facilitate the holding of elections to the Board of Management in due course as per the schedule of time fixed by the Central Bnak. The Coimbatore City Co-operative Bank, Ltd., had its delegate in one Dr. T. V. Sivanandam. The

Cobichettipalayam Co-operative Urban Bank, Ltd., elected as a delegate one P. K. Muthuvelappa Goundar at its general meeting held on 18th October, 1959 and forwarded his name and a copy of the resolution appointing him to the Central Bank by its letter, dated 19th October, 1959. This was received by the Central Bank on 20th October, 1959: It must be mentioned that the printed voters' list of the Central Bank published in the notice board on 20th October, 1959, contained the name of one S. K. Subramania Iyer *alias* Vembu Iyer as the delegate appertaining to the Gobi Co-operative Urban Bank, Ltd. But by a subsequent correction of the voters' list, presumably after the receipt of the name of the fresh delegate, P. K. Muthuvelappa Goundar, the voters' list was corrected substituting his name in the place of the old delegate.

In respect of the constituency of 'the Audit Union and Urban Bank' the two delegates, P. K. Muthuvelappa Goundar, the delegate of the Gobi Co-operative Urban Bank, Ltd., and Dr. T. V. Sivanandam, the delegate of the Coimbatore City Co-operative Urabn Bank, Ltd. filed their nominations within the time prescribed by the election rules and they came on for scrutiny by the President of the Central Bank in accordance with the said rules, and the President declared both of them as duly and validly nominated to stand for election for a seat in the Board of Management. It appears from the record that Dr. T. V. Sivanandam objected to the nomination of P. K. Muthuvelappa at the time of the scrutiny.

Dr. T. V. Sivanandam, the delegate of the Coimbatore City Co-operative Urban Bank, Ltd., filed an application before the Deputy Registrar of Co-operative Societies, Coimbatore, invoking the aid of section 51 of the Madras Co-operative Societies Act, which was taken on his file as A.RC. No. 140 of 1959. He alleged in the said petition, to which he impleaded the Secretary of the Central Bank as the first respondent, the President of the Central Bank as the second respondent, and P. K. Muthuvelappa Goundar as the third respondent, that the said Muthuvelappa Goundar cannot be nominated as a candidate since his name is not in the final voters' list prepared and published by the Bank that though objection was taken by him at the time of the scrutiny, the President of the Central Bank was pleased to hold that Muthuvelappa Gounder's nomination was valid, that the decision of the President was against the rules framed for the conduct of election. He accordingly prayed for setting aside the order of the President of the Central Bank declaring Muthuvelappa as duly nominated, and for declaring him as the duly elected director from 'the Audit Union and Urban Bank Constituency.'

This application was resisted by all the respondents before the Deputy Registrar. Their contention was that the nomination of the third respondent was valid that there had been no violation of the election rules by accepting the candidature of Muthuvelappa despite the fact that he came in as a delegate only after 10th October, 1959 and that the Central Bank had a power of revision of the electoral roll under Bye-law 33-A, that the bye-law should prevail over the election rules which were subsidiary regulations and that the petition should therefore be dismissed.

The Deputy Registrar of Co-operative Society took evidence, held an enquiry and reached the conclusion that the nomination of Muthuvelappa Goundar was not valid and should not have been accepted by the President of the Central Bank. The main reason of the Deputy Registrar in reaching that conclusion was his view that there was a contravention of the election rules by reason of Muthuvelappa's name as delegate having been received on 20th October, 1959. The following extract from his order clearly reveals the basis of his order :

"I therefore find that the inclusion of the name of the third respondent (P. K. Muthuvelappa Goundar) as a delegate of the Gobichettipalayam Co-operative Urban Bank, Ltd., on 20th October, 1959, in the delegates' list of the Coimbatore District Co-operative Central Bank, Ltd., Coimbatore, though may be right or proper under the Bye-law 33-A or rule 10-A of the rules framed under the Madras Co-operative Societies Act (VI of 1932) for revising the list of voters 30 days prior to the date of election of this Bank, (the date of election of the Bank being 5th December, 1959) the accepting of the nomination to stand as a candidature for the election is invalid and contrary to the rules framed by the Board. I therefore declare that the selection or approval by the second respondent as presiding Officer of the 3rd respondent as a candidate for the 'Audit Union' and 'Urban Bank' constituency directorship of the Coimbatore District Co-operative Central Bank, Ltd., Coimbatore, is set aside

and order that his name be cancelled from the list of selected candidates for contesting the election for this particular constituency."

P. K. Muthuvelappa Goundar, the candidate whose nomination has thus been rejected by orders of the Deputy Registrar of Co-operative Societies, feeling aggrieved by the said order, has preferred the above writ petition. He has impleaded the Deputy Registrar as the first respondent, the rival candidate Dr. T. V. Sivanandam as the second respondent, the Secretary of the Central Bank as the third respondent and the President of the Central Bank as the fourth respondent in this petition.

The ground on which the petitioner seeks relief by way of *certiorari* under Article 226 of the Constitution is firstly that the Deputy Registrar of Co-operative Societies had no jurisdiction as the application before him purporting to be under section 51 of the Madras Co-operative Societies Act was incompetent and unsustainable, and secondly that the Deputy Registrar erred in law in cancelling his nomination approved by the President on a misconception of the nature and scope of the election rules.

I shall first deal with the question of jurisdiction of the Deputy Registrar under section 51 of the Madras Act VI of 1932. The section provides that any dispute, touching the business of a registered society, (other than a dispute regarding disciplinary action taken by the society) amongst members, past members and persons claiming through members, etc., or between a member, past member, etc., and the society or between the society or its Committee and any past committee, etc., or between the society and any other registered society, shall be referred to the Registrar for decision. There is no controversy in this case that if there is a dispute touching the business of a registered society within the meaning of section 51, the other requirements of section 51, namely, the categories of persons between whom the dispute should subsist are satisfied. The dispute between the parties which was the subject-matter of adjudication before the Deputy Registrar can be treated either as between members or persons claiming through members, which means that section 51, clause (*a*) is complied with. The dispute, if any, can equally be brought within section 51, clause (*b*). The only contention urged by the learned Advocate-General, who appeared for the petitioner in this case was that the dispute now between the parties, namely, the validity of the nomination of one of the candidates is not a dispute touching the business of a registered society. His contention is that though the election of directors as such will constitute a dispute touching the business of a registered society, if the election is impugned by anybody as held by a decision of a Full Bench of this Court in *Madhava Row* v. *Surya Rao*[1], the stage of nomination is different and to that stage the principle of the Full Bench decision is not applicable. Mr. P. S. Kailasam, appearing for the contesting respondent (the second respondent) contended that the principle of the Full Bench decision is fully applicable to the facts of the present case and cannot be distinguished in the manner submitted by the learned Advocate-General. It is only necessary for me to examine the scope of the said Full Bench ruling as all the cases on the subject have been dealt with and considered in it. I do not find that there is any subsequent decision dealing with the point nor was my attention drawn to any such ruling. The headnote of the Full Bench decision runs as follows :

> "A dispute relating to the election of the Directors of a Co-operative Bank registered under the provisions of the Madras Act (VI of 1932) is one 'touching the business' of the Bank, within the meaning of section 51 of the Act".

The words 'dispute touching the business of a registered society' were construed as words of wide import bringing within its ambit not merely disputes directly arising out of the business of the society but also disputes having reference or relation to or concerning the business of the society. The word 'touching' was held designed to enlarge the scope of the word 'business'. All that was permitted to be done by the bye-laws governing the society and by the rules framed under the Act were deemed to be the business of the society. At page 1064 the following observation occurs :

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1. (1953) 2 M.L.J. 340 ; I.L.R. (1953) Mad. 1047 (F.B.).

"It therefore follows that, in order to determine the activities or the 'business' of the corporation, one has to look into the provisions of the Act and the rules and the bye-laws framed by the society. All matters comprised in them or are incidental to or necessary for carrying out those matters must be deemed to be the business of the corporation. The power of the corporation is derived from these three sources, and so long as its activity is within those powers, it cannot be questioned as being invalid".

"A dispute relating, therefore, to election would undoubtedly be a dispute concerning or relating to the business of the society".

Having examined the Full Bench decision closely I am of opinion that the contention on the part of the petitioner is not sustainable. It is not possible to dissociate the stage of nomination from the stage of return of the candidate after polling and declaration of results, in such a manner as to import the notion of business of society only to the latter stage of election, and not to the former stage of nomination. In fact the whole process of election commences from the stage of nomination and the word election has been considered as including nomination also in its wide sense of the term.

In *Ponnuswami* v. *Returning Officer, Namakkal*[1], of the Supreme Court observed as follows :—

" . . . . . . the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

I am of opinion that the *ratio decidendi* of the Full Bench decision fully applies to the facts of the present case, and that therefore the jurisdiction of the Deputy Registrar of Co-operative Societies was rightly invoked under section 51 of the Act.

The next question that has to be considered is as regards the nature of clause (4) of the election rules, which has already been set out. The contention urged on behalf of the petitioner is that it should not be construed as mandatory entailing forfeiture of rights especially when there are no words in the said rules prescribing the consequence of a failure to comply with the said rules. The contention on behalf of the second respondent is that having regard to the word 'shall' which is contained in the clause it must be held to be mandatory carrying with it the inevitable deprivation of the rights of persons who do not comply with the said rules.

The distinction between absolute and directory enactments or mandatory and recommendatory provisions, rules and regulations is well known and cannot admit of any doubt. The contravention of an absolute enactment renders the resulting act invalid and void while non-compliance of a directory enactment leaves the validity of the thing done untouched. "An absolute enactment must be obeyed or fulfilled exactly. But it is sufficient if a directory enactment be obeyed or fulfilled substantially". *Woodward* v. *Sarsons Lahore*[2], *Punjab Co-operative Bank* v. *I.T.O.*[3] The classification is of vital importance as the consequences flowing from it lead to greatly divergent results.

How to distinguish the one kind of enactment or rule from the other is a problem which cannot be solved by applying set formulae or using any acid test or invoking any golden rule of construction. This is again a field of law where common sense has to be called in aid. In *Thakur Pratap Singh* v. *Shri Krishna Gupta and others,*[4] their Lordships observe as follows :

" . . . . . We deprecate this tendency towards technicality ; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter ; they cannot be broken ; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues ; and when the Legislature does not itself state which is which Judges must determine the matter, and exercising a nice discrimination, sort out one class from the other along broad-based, commonsense lines".

1. (1952) S.C.J. 100 : (1952) 1 M.L.J. (S.C.) 775 : (1952) S.C.R. 218 at p. 228.
2. L.R. 10 Common Pleas 733 at 746.
3. (1941) 1 M.L.J. 130; L.R. 67 I.A. 464 at 476 (P.C.).
4. (1956) S.C.J. 143 : (1955) 2 S.C.R. 1029 at 1031.

Oftentimes the statute or the body of rules, the provisions whereof come in for determination, is mute in the sense that it does not prescribe the consequence or penalty for non-conformity or non-adherence. To use the expression of Lord Sumner in a well-known case, *Rex* v. *Nat Bell Liquors, Ltd.*,[1] it bears the inscrutable face of a Sphinx.

In *Liverpool Bank* v. *Turner*,[2] Lord Cambell observed as follows :—

"No universal rule. . . . . can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed ".

In *Howard* v. *Bodington*[3], Lord Penzance made the following observation :

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subjct-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory. . . . I have been very carefully through all principal cases but upon reading them all the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together and the tendency of my mind after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Bank* v. *Turner*[2]."

The primary thing to be considered is of course the language of the enactment or the rule. Care must however be taken not to unduly stress the language as it may result in sacrificing the substance to the form. The proper approach seems to be that the Court considering the nature of the enactment must, without ignoring the plain words of the enactment or rule, have regard to the scope, object, scheme, context and design of the Act and the purposes for which the Act or rule is intended. The consequence of taking one view or the other is also a matter for consideration.

The following passage from Craword "On Statutory, Construction" occurring at page 515 may be usefully referred to :

"If the provision involved relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or directs certain actions with a view to the proper, orderly and prompt conduct of public business, the provision may be regarded as directory, but where it directs acts or proceedings to be done in a certain way and indicates that a compliance with such provisions is essential to the validity of the act or proceedings, or requires some antecedent and pre-requisite conditions to exist prior to the exercise of the power, or be performed before certain other powers can be exercised, the statute may be regarded as mandatory ".

To the same effect is the following passage from *Corpus Juris Secondum* : Vol. 82, p. 872.

"Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required or is a mere matter of form and what is a matter of essence can often be determined only by judicial construction ".

Generally where affirmative language is used the enactment or rule is regarded only as directory. Though expressed in affirmative language the words may be absolute, explicit and peremptory, calling for including a negative by implication. Everything will depend upon the object and purposes of the enactment or rule, the context or what is called the legislative intent, the intention of the authors of the rules.

In *State of U. P.* v. *Manbodhan Lal*[4], the Supreme Court observed as follows :

"The use of the word 'shall' in a statute though generally taken in a mandatory sense does not necessarily mean that in every case it shall have that effect that is to say that unless the words of the statute are punctiliously followed the proceeding or the outcome of the proceeding, would be invalid ".

Provisions fixing the time for performance of acts are ordinarily held directory where there are no words prohibiting the doing of the thing after the time specified

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1. L.R. (1922) A.C. 128 at 159.
2. 30 L.J. Ch. 379 at 380.
3. L.R. (1877) 2 Pro. Div. 203 at 211.
4. (1958) S.C.J. 150 : (1958) M.L.J. (Crl.) 85 : A.I.R. 1957 S.C. 912.

and there is no penalty for the delay. Maxwell on 'Interpretation of Statutes', 10th Edition at page 381, states the law thus:

"To hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day, under a penalty, made a list not delivered till a later day invalid would in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors, a conclusion too unreasonable for acceptance".

Reference may again be made to Crawford on "Statutory Construction" at page 535:

"As a general rule a statute which specifies a time for the purposes of an official duty will be considered as directory so far as the time for performance is concerned especially when the statute fixes the time simply for convenient or orderly procedure".

At page 536, it is stated thus:

"Further more it may be assessed as a general rule that where a statute imposes upon the public officer the duty of performing some act relating to the interests of the public and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not as a limitation of the exercise of the power unless it contains negative words denying the exercise of the power after the time named or unless from the character of the Act to be performed the manner of its performance or its effect upon public interests or private rights it must be presumed that the Legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named".

There are also cases where absolute and directory provisions are contained in the same Act. In respect of such enactment Craies at page 246 of his book 'Statute Law' observes as follows:

"Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. For 'there is a known distinction' as Lord Mansfield said in *R.* v. *Loxdale*[1], between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory".

In *Woodward* v. *Sarsons*[2], the question that had to be decided was whether a provision under the Ballot Act, 1872, regarding the marking of ballot papers was mandatory or directory. The Ballot Act, 1872, consisted of two parts: the principal part and two schedules which contained rules and forms. It was held that the provisions in the schedule were merely directory but that those contained in the principal part of the Act were to be considered as imperative and absolute. The same principle was followed in *Phillips* v. *Goff*[3].

Clause (4) of the election rules does not contain any prvision by way of a penalty in case the time-limit for return of the delegate is not strictly adhered to. My attention is drawn to the fact that previously till the year 1956 the election rules contained a clause to the following effect:

"The delegates elected either after 31st August or before 1st July of the election year will not be included in the list of voters. Societies which fail to observe this procedure will lose their privilege of partaking in the election of directors to the Bank."

Such a clause is significantly omitted in the rules now governing the election to the Board of Management of the Central Bank.

I hold that clause (4) of the election rules fixing a time-limit for return of the delegates of the several constituencies is merely a directory provision for the convenience of orderly election and cannot and was not intended to operate as a deadline preventing the Central Bank from recognising and accepting delegates beyond that time and consequently disfranchising the member society from participating in the delegates election. My reasons are: (1) the language of the clause is affimative and it is not reasonable to include in it an implied negative to the effect that non-compliance thereof will result in total forfeiture of rights regarding the delegates elecion; (ii) till the year 1956 the election rules contained a clause providing for forfeiture of rights in respect of late comers, but such a clause is absent

1. (1758) 1 Burr. 445, 447.
2. L.R. (1875) 10 C.P. 733.
3. L.R. (1886) 17 Q.B.D. 805.

in the rules now governing the Central Bank ; (iii) the return of delegates within a prescribed time is an unessential element which does not in any way affect the qualification or competency of the delegate or the essential requisites of the election like nomination, scrutiny of nomination, withdrawal, polling, etc. ; (iv) the consequence of holding the time-limit as being mandatory will cause deprivation of rights, and Courts should not readily lean towards such a construction unless the language, scope and object of the enactment or rule are compelling and inevitable.

The election rules prescribe various formalities in clauses (4) and (5), such as the preparation of voters' list, publication of the list in the notice board of the Central Bank. It is not necessary for me to consider whether the entirety of the said provisions is mandatory or directory. The only question which calls for determination in this writ petition is whether the return of the delegate to the Central Bank has been made before 10th October, 1959 and if not so made does the member society lose the right to participate in the election of the Board of Management. I have already held that so far as that provision is concerned it is merely directory.

The scope and applicability of Bye-law 33-A of the Central Bank may now be considered. That bye-law provides that the Board of Directors shall maintain a list of members on the rolls of the Bank who are qualified to vote at general meetings and shall revise such list 30 days prior to the date fixed for the election of the Committee of the Bank. The Deputy Registrar of Co-operative Societies has taken the view that the said bye-law will not avail the revision of the voters' list in a manner repugnant to the election rules. It may be that if the time-limit fixed in the election rules for the return of the delegate to the Central Bank is considered as mandatory, then Bye-law 33-A by itself should not be construed as vesting the Board of Directors with an overriding power to revise the list. Of course if the said provision in the election rules is held to be directory then bye-law 33-A need not be resorted to at all. I am of opinion that Bye-law 33-A has got to be read along with the election rules so as to bring about a harmonious result and this can be done only by construing the time-limit fixed under clause (4) of the election rules regarding the return of delegates as being merely directory. In my opinion the provisions of Bye-law 33-A constitute another indication as to the mode of construction of clause (4) of the election rules.

A point was raised before me on behalf of the contesting respondent that the voters' list was not corrected so as to include the name of Muthuvellappa Goundar on the crucial date, namely, the date of filing the nomination. On behalf of the petitioner it was contended that the voters' list was corrected on 20th October, 1959, after the receipt by the Central Bank of the communication from the Gopichettipalyam Co-operative Urban Bank. The Secretary of the Central Bank deposed before the Deputy Registrar as follows :—

"A list of delegates to the Bank was prepared on 10th October, 1959, by me as per the subsidiary regulations. Even after 10th October, 1959, names of some delegates were received. They were included in a revised list as per Bye-law 33-A. The first list was prepared on 12th October, 1959, as 10th and 11th were public holidays. In my view the revised list is the final list ".

He further deposed, on being cross-examined as follows :—

" The names of delegates who came after 12th October, 1959, were included in the list of voters which was in the office and not in the list put upon the notice board. I do not exactly remember when correction was made ".

A supplemental affidavit filed before me avers that the correction or revision of the voters' list was on 20th October, 1959. On behalf of the contesting respondent a supplemental counter-affidavit is filed denying this averment. The question as to when the voters' list was corrected is a question of fact, which cannot be gone into by this Court in these proceedings. The list produced before the Deputy Registrar on behalf of the applicant before him Exhibit P-1 in the case, is the unamended list. The list produced before him on behalf of the Central Bank, Exhibit D-1 is the amended list. I have no jurisdiction to investigate this fact, namely, when the voters' list was amended and I do not think that any finding in this behalf is necessary for the disposal of the writ petition. I therefore express no opinion on that question.

The Deputy Registrar has set aside the nomination of Muthuvelappa Goundar accepted by the President of the Central Bank on the ground that such acceptance would be repugnant to or in contravention of the election rules. In my view the mere fact that Muthuvelappa Goundar came in as a delegate by reason of a communication from the Gobichettipalayam Co-operative Urban Bank which reached the Central Bank only on 20th October, 1959, cannot disqualify him from being treated as a proper delegate. The President of the Central Bank was right in accepting his nomination and the order of the Deputy Registrar of Co-operative Societies, Coimbatore, cancelling the nomination is vitiated by error of law apparent on the face of the record. The jurisdiction of this Court under Article 226 of the Constitution is therefore properly invoked to quash the impugned order. The only question considered by this Court is the alleged invalidity of the nomination of Muthuvelappa by reason of his having come in as a delegate after 10th October, 1959. I have held that on that ground his nomination cannot be invalidated. If there are other grounds, upon which I express no opinion, attacking the validity of the nomination, these proceedings do not set them at rest.

Mr. P. S. Kailasam, the learned counsel for the second respondent, contended that the petitioner had a remedy by way of revision to the Registrar under section 51 (5) of the Madras Act (VI of 1932), and that remedy being adequate and effective to redress his grievance, if any, ought to have been availed of by him before resorting to this Court. The learned counsel pointed out that the existence of an alternative remedy, equally convenient, beneficial or effective, is a ground for refusing the discretionary relief of a *certiorari*. He relied upon the decision of the Supreme Court in *Rashi & Son* v. *Income-tax Investigation Commission*[1], and *N. T. Veluswami Thevar* v. *G. Raja Nainar and others*[2]. The availability of other remedies to the aggrieved party may weigh with the Court in refusing a writ under Article 226 of the Constitution but cannot disentitle him to get the relief or preclude the Court from issuing the writ. I am of opinion that however convenient or expedient it may be to dismiss a writ petition before issuing *rule nisi* on the ground of a subsisting alternative remedy, it may not always be just to do so at the final stage, when the parties have incurred all the expenses and the Court has gone into the matter fully. In *Official Receiver, Guntur* v. *Seshayya*[3], dealing with the exercise of revisional jurisdiction under section 115, Civil Procedure Code, this Court observed as follows :

> " The principle that revision should not be allowed when another remedy is available is a principle which may very conveniently be applied at the stage of admission. This revision petition was admitted by Mr. Justice Varadachariar nearly two years ago and since it has been admitted we think that it would be wrong at this stage to say that it must be dismissed merely because the Official Receiver might have proceeded by way of suit ".

In the result, I confirm the rule *nisi* and make it absolute. There will, however, be no order as to costs.

P.R.N. ——— *Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Mrs. Nellie Wapshare and others .. *Appellants**

v.

Pierce Leslie & Co., Ltd. and others .. *Respondents.*

Company Law—Assets of a defunct company concealed by fraud—Suit for recovery by the ex-shareholders of the defunct company—Action is maintainable—Limitation Act (IX of 1908), *Article* 144*—Applicability to such an action by the ex-shareholders—Fiduciary relationship—Company and its Secretary—Advantage gained by fiduciary Constructive fraud and unjust enrichment—Trusts Act (II of* 1892), *section* 88*—Analogous principles.*

The plaintiffs representing the entire body of shareholders of a private limited company (which was liquidated) sued for possession, vesting or reconveyance of the suit properties alleged to have been

1. (1954) S.C.J. 264 : (1954) S.C.R. 738 (S.C.).
2. (1959) 2 M.L.J. 48.
3. (1940) 2 M.L.J. 860 at 866.

* Appeal No. 471 of 1955.

14th October, 1959.
22nd Asvina, 1881 Saka.

transferred through the exercise of fraud, misrepresentation and undue influence on the part of the 1st defendant (who was the Secretary of the Company) and defendants 2 to 14 who stood to the plaintiffs in a fiduciary relationship of trust and confidence, in favour of a company, the shares of which were held by the 1st defendant and other direction of the defunct company.

Held, The agreement under which the Secretaries functioned under the defunct company was a general one giving the secretaries an apparently large power to devote their time to the business and affairs of the company in a sincere and faithful manner. They actually discharged wider functions than those of mere administrative assistants and functioned in a manner very similar to that of an agent for sale. Their own correspondence revealed the existence of conflict between interest and duty and their knowledge of this conflict. Thus a fiduciary relationship existed between the secretaries and the defunct company.

Where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed a fiduciary relationship springs into existence. Once it springs into existence it is for the person benefiting by the transaction to show that the other party was at equal advantage and that nothing was concealed that the other party had disinterested advice and that the transaction itself was fair and without any element of injust enrichment. Where that burden is not discharged the Court will interfere to restore what has been taken away to the extent to which it constitutes unjust enrichment'.

Where a fiduciary relationship exists and a situation exists which was probably taken advantage of by the fiduciary and where there is an obvious element of unjust enrichment the absence of an independent advice does become a material factor in judging the case.

The principle of 'constructive fraud' has received recognition in section 88 of the Trusts Act and a constructive trust is raised wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee.

It is true that under section 559 of the Companies Act, 1956 (corresponding to section 243 of the prior Act) a company could be revived or restored to existence by the Court within two years after dissolution under appropriate circumstances. There are indications in the Indian Company Law that the shareholders are the true residuary legatees of the debts and undistributed or concealed assets of a defunct company, unlike the case in England where the Crown is the legatee upon the doctrine of *bona vacantia*. A suit by the former shareholders of a defunct company to recover assets concealed by fraud is maintainable.

There is a lacuna in the Companies Act 1956, since no provision similar to the English Companies Act vesting the right to the properties of a defunct company in the general body of the ex-shareholder has been made.

Laches may be held sufficient to bar a party from relief in certain circumstances and in the exercise of a judicial discretion vesting in Courts.

The period of limitation should be calculated in the instant case only from the date of impugned sales for the purpose of applying Article 144 of the Limitation Act.

Article 144 no doubt applies to a suit by an owner seeking to recover a possessory interest against the party holding adversely to the true title. But it is also the residuary article whih applies to every kind of suit to recover a possessory interest against the person who has no answer to that claim unless it is the answer of adverse possession which must of course be tried on the merits. The plaintiffs herein sued to recover a possessory interest or the corpus itself because they maintained that the corpus had been the subject of a fraudulent sale virtually in favour of the fiduciary who had exploited the situation of trust. They can hence claim to be owners in the sense that they are heirs at law of the defunct company. The suit was held to be in time.

Appeal against the decree of the Court of the Subordinate Judge, Nilgiris, Ootacamund, dated 30th October, 1954, in Original Suit No. 31 of 1951.

V. P. Raman, M. G. Mathew and *K. P. Abraham*, for Appellants.

O. T. G. Nambiyar instructed by *M/s. King* and *Partridge, A. J. Gansalves* and *M/s. Lobo* and *Alvares*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is an appeal by the plaintiffs in the Court below representing the entire body of shareholders of a private limited company, the O.V. Estates Ltd. (16th defendant) which was liquidated, for possession vesting or reconveyance of the suit properties (Schedules A to D) alleged to have been transferred through the exercise of fraud, misrepresentation and undue influence on the part of defendant 1 (Messrs. Pierce Leslie & Co., Ltd.) and defendants 2 to 14 through the 1st defendant, who stood to the plaintiffs in a fiduciary relationship of trust and confidence, in favour of the O.V. Estates (1939) Ltd., the 15th defendant (new company).

The learned Subordinate Judge of Nilgiris dismissed this suit upon findings adverse to the plaintiffs upon all the main issues, including limitation.

In the presentation of this appeal before us, learned counsel for the appellants has attempted, to base their case upon certain principles of equity jurisprudence, which have received both statutory recognition and the affirmation of Courts in many precedents, within the ambit of the specific case of actual fraud, wilful misrepresentation and the deliberate exercise of undue influence, which were not proved, and which have now been abandoned. But this is in no sense the superimposition of a new case ; it is not any other frame of suit upon the facts and probabilities of the record. It is the consideration of those facts and probabilities in a somewhat different complexion, because the plaintiffs (appellants claim to be entitled to succeed, in the light of certain principles of law repeatedly applied by Courts, particularly Courts exercising a jurisdiction in equity, conceding that they had failed in proof in certain areas of their claim. The tenability of this, in the wide sense, is not disputed by learned counsel for the first defendant (Messrs. Pierce Leslie & Co., Ltd.) or the 15th defendant, which may be hereinafter termed 'The New Company' as distinguished from the 'Old Company' (the 16th defendant), who are the main contesting respondents in appeal.

The case of the appellants may be further clarified as follows : The plaintiffs, who were all members of a single British family, the Wapshares, conducting planting operations in an estate in the Nilgiris, formed the exclusive body of shareholders of a private limited company founded by the late J.H. Wapshare. The 1st defendant company were the secretaries in actual conduct of the planting operations, under the directors of this old company (16th defendant), who included defendants 2 and 4. In the context of increasing pressure from the Imperial Bank of India, who were the financiers and debenture trustees under a debenture trust deed (Exhibit A-18) which created an English mortgage in their favour over the properies to sell the estates and liquidate the indebtedness under threat of foreclosure and actual entry upon the properties, the plaintiffs (appellants) entered into the impugned transactions, and consented to the liquidation of the old company. They were persuaded to this course by the 1st defendant company, which stood to them in a fiduciary relationship of trust and active confidence. In these transactions, they were *in terrorem* as far as the threats of the Bank to foreclose and to enter upon the properties were concerned, and further an actual date-line (the 15th November, 1937) had been fixed by the Bank. They had no independent legal advice ; in fact, they had no disinterested advice of any kind. Though the transactions were in *form* with the new company, the 15th defendant, it was really the 1st defendant and two or three of the directors of the old company (16th defendant) itself, who were the promoters of the vendee company, responsible for its flotation. Quite apart from any actual fraud, wilful misrepresentation, or unde influence, the transactions are impeachable upon the principle of what is kown as 'Constructive Fraud'. There is also a heavy burden on the 1st defendant company and the ex-directors of the old company, who associated themselves with the formation of the new company to clear themselves in respect of these transactions ; a burden which has received statutory recognition in this country in section 111 of the Indian Evidence Act. That burden has not been discharged in this case. Further, the facts abundantly establish that, in the context of another offer for 14 lakhs for the entire estate including Naduvattam, the offer which appellants were induced to accept was less than a fair price to the extent of about 2 lakhs ; there was certainly 'unjust enrichment' to this degree, of the 1st defendant company and certain ex-directors of the old company. This they must now disgorge, in this respect they must make restitution. Every difficulty of formal rigour, whether arising from the non-identity of the appellants with the legal *persona* of the old company, or their incapacity to represent it after its liquidation, or the non-identity of the 1st defendant company with the new company (15th defendant) in the outer semblance of the transactions, must be resolved in favour of the appellants. For the Courts' power to "pierce the veil" of corporate personality in such cases, in order to administer equity and to render justice, is large and indisputable. The bar of limitation is accepted as an absolute bar if it exists ; for though there is authority for the

view that the Statute of Limitation must be beneficently construed in favour of him who seeks to sue, nevertheless, the interpretation of it must be strict for equitable grounds cannot be imported into that task. But it is submitted that the suit as framed for recovery of possession of the *corpus* of the estate was not barred, and that the suit is in time.

We have set forth these contentions at a little length, even before proceeding into the history and facts of the case, because the case presented in appeal, though within the ambit of the same record of facts and probabilities, attempts the application of somewhat different legal concepts to those facts. It is only proper that the contentions *per contra*, particularly as advanced by learned counsel for 1st defenant company before us, should be tersely indicated.

Firstly, the alleged fiduciary capacity is denied. It is not true that there was any position of trust and active confidence between the plaintiffs (shareholders) and the 1st defendant company who were strictly secretaties with limited functions and powers working under the orders of the directors of the old company. Nor were they 'agents for sale' in respect of the attempted sale of the estate ; even here, they were purely carrying out secretarial functions of advertisement, communication of offers to the Board of Directors, etc. Actually, there could be no jural relationship between the plaintiffs (shareholders) and the secretaries; for there is an amplitude of authority on the proposition that the shareholders of a company are quite distinct from the legal *persona* of the Corporation. With regard to the ex-directors of the old company, of course, it seems impossible to deny that they were at least *quasi* trustees, if not trustees proper, in respect of the shareholders. But this is academic, for defendants 2 to 14 have virtually gone out of the suit. They are not sought to be made personally liable, three of them are dead, and the legal representatives have not been brought on record.

Even if a fiduciary capacity could be spelt out of the facts, it is not the law that every transaction between the trustee and the *cestui que* trust is inhibited. Where there is an open disclosure of facts by both sides, where the *cestui que* trust is voluntarily entering into the transaction upon an equality of footing and at arm's length, the mere existence of a fiduciary relationship will not suffice to impugn a transfer, or to have it set aside. The Wapshares, particularly Miss Dorothy Wapshare (3rd plaintiff), were capable, knowledgeable and not in the least likely to be deflected in the exercise of an independent judgment by whatever Mr. Thorne (3rd defendant), who admittedly acted on behalf of 1st defendant company in these matters, could have said. Above all, the price paid was fair and adequate, there was no 'unjust enrichment' whatever. This is indeed the crux of the matter and here Mr. Nambiyar for the 1st defendant company has been at great pains to attempt to convince us, upon a minute analysis of data, that an aequate and fair price was paid for the estate taken over.

It is strenuously contended that appellants cannot maintain this suit in any manner known to law. A company is distinct from its shareholders, they have no rights in the properties of the company, or in respect of the remedies it could enforce against its wrongdoers. It is conceded that the latter proposition is, indeed, not unqualified. For, even during the life of a corporation, authorities have held that a minority of the shareholders could sue where a tyrannical majority bars redress, where the corporation acts *ultra vires* of its powers, where it perpetrates fraud, etc. But the present is not such a case. By the voluntary liquidation, the legal personality of the old company came to an end. The company could have been revived or restored to legal personality within two years of its dissolution under section 243 (1) of the Companies Act. That was not done, and that makes an end of any remedy open to the erstwhile shareholders (the plaintiffs), even against a 'fraudulent' trustee in possession of assets. The doctrine of 'piercing the veil' of corporate personaliy cannot be invoked here. Nor can the learned counsel for the appellants seek the intervention of this Court upon such a general doctrine as *ubi jus ibi remedium*, though Holt, C.J., might have said in *Ashby* v. *White*[1], that it was vain thing to imagine a right without a remedy ", this cannot be invoked to clothe plaintiffs with a capacity to sue that they do not possess.

1. 1 Smith's Leading Cases, 253 at 272.

It is submitted that the bar of limitation is equally operative. As the suit was framed, and upon the wording of the reliefs in the plaint, it is at least difficult to contend that this was a suit for recovery of a possessory interest under Article 144 or a suit based upon dispossession and discontinuance, under Article 142. But assuming that Article 144 did apply, and that parties understood the suit as so framed, plaintiffs could not sustain this action, they not being owners of property, seeking to recover possession from a person holding the estate adversely to them. Of the other articles, such as Article 91-95 and 120, Article 120 is the most applicable, being the residuary article for such actions in equity; but if the article is to be applied the period of limitation is only 6 years, and the suit is time barred.

Mr. Nambiyar also submits that appellants were undeniably guilty of laches, and 'lying by' if not of actual acquiescence. They cannot wait till the estate became far more valuable by accretions, by changes in the climate of industry, by investment and developments by the new company, and then seek to recover the corpus, or to obtain its re-conveyance. Authorities have proceeded so far as to state that mere laches could disentitle a party to any relief: though he concedes that the authorities do not speak with one voice on this subject. The actual excuse put forward by the plaintiffs, that it was only after they perused the *Madras Mail* article dated 3rd September, 1948 (Exhibit A-216), that they awoke to a realisation of their true rights, and then consulted Dr. C. P. Ramaswami Aiyar, which led them to institute this suit, is puerile and inadequate. Accounting for *laches* cannot merely relate to some mental state of exceptional ignorance, particularly where, as in the present case, a corporation proceeds with its work of investment and development, naturally assuming that the failure on the part of the appellants to advance any claim is acquiscence.

It is now time to proceed into the facts and history of the matter. In view of the intricate and interesting questions involved, we have done so in some detail; particularly with regard to the area and context of the impugned transactions. But the documentation in this suit is heavy (three volumes of printed papers), and we have contented ourselves with indicating the broader landmarks of documentation so that the narration of events need not be impleaded. Similary, in the discussion of legal principles as applying to the facts, we have made a judicious selection from the extensive case-law (English, American and Indian) and passages from classic treatises of law, which the research of learned counsel has made available to us.

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[After setting out the facts and history of the matter leading up to the impugned transactions His Lordship proceeded :—].

We shall now turn to the authorities and text-books cited, illustrating the legal principles, and to the contexts of facts to which they have been applied. As these are mixed questions of fact and law, we shall formulate them as issues, as follows :

(1) What are the principles of "Constructive Fraud" and "Undue Enrichment"?

(2) What are the principles of 'Fiduciary Relationship'? Did a 'fiduciary relationship' exist between the first defendant company and the plaintiffs in this case? As the plaintiffs were distinct from the Corporation (old company), could such a relationship arise? Are the directors *quasi* trustees?

(3) Under what circumstances can a transaction between the *cestui que* trust and the trustee be upheld? What is the part played by the absence of independent advice, or legal advice, in such cases?

(4) What are the principles distinguishing a corporation as a legal entity, from its shareholders? Can the shareholders maintain a suit, when the corporation is alive as a juristic entity, and, if so, under what circumstances? Can the erstwhile shareholders of a dissolved corporation institute an action to recover assets from a 'fraudulent' trustee, as here, either under the English, American Law, or under Indian Company Law?

(5) The question of laches, and does it disentitle the appellants?

(6) The problem of Limitation in this case, viewed both upon the frame of the suit, and whether the remedies that could be given are time barred.

(7) The actual determination and scope of the reliefs, if any, to which the plaintiffs (appellants) are entitled.

'Constructive Fraud,' is a creation of Courts exercising equity jurisdiction, directed against conduct which might be free from moral turpitude or actual evil design, but which might cause injury in a confidential relationship, or of the public interest. Lord Haldane said in *Nocton* v. *Ashburton*[1];

"The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word 'fraudulent' being applied to them. What it really means in this connection is, not merely fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

As observed by Cheshire and Fifoot (The Law of Contract, Fourth Edn, page 228):

"In the case of certain transactions, equity obliges one of the parties, such as a solicitor who purchases the property of his client, to prove, not merely that he was guiltless of untruthful statements, but that the transaction was advantageous to the other party. By refusing to uphold the transaction unless these requirements are satisfied, equity hopes to suppress the temptations which might otherwise be found too strong for the party's virtue."

Pomeroy states in "Equity Jurisprudence" (Volume 2), section 922, upon this subject;

"It (constructive fraud) covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equiry because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence, and the absence of fault,".

The expression itself is not a very happy one; "since it embraces cases in which there has been no dishonesty". (Cheshire and Fifoot at page 228). But the expression has come to stay, as a convenient designation of a category of legal wrongs, of which a Court will take notice. In our own law the principle has received recognition in section 88 of the Trusts Act, and

"a 'constructive trust' is raised by a Court of equity whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee."

See Lewin on 'Trust' (15th Edition, page 165). In *Corpus Juris Secundum*, Vol. 89, page 1015), the true principle of the raising of a 'constructive trust' is expressed as follows:

"A constructive trust is a creature of equity, defined *supra* as a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest."

The essence of this doctrine has been expressed, if we may say so with great respect, by Viswanatha Satri, J., in *Eswara Gowd* v. *Somasekhara Gowd*[2]:

"A transaction of purchase by a person occupying a fiduciary position under circumstances in which his own interests are or may be adverse to those of the person who owns the property and whose interests he is bound to protect, is always regarded by the Courts with the utmost jealousy. If such a transaction is impeached by the beneficiary whose interests have been adversely affected, the purchaser must show that there has been no fraud, or concealment or advantage taken by him of information acquired by him by virtue of his position.......He must also show that the beneficiary had independent advice, and every kind of protection in connection with the transaction of purchase."

We might also note that in Sheridan on 'Fraud in Equity' (1957) the meaning of 'constructive fraud' is discussed at page 24 in a lucid analysis.

The doctrine of 'Unjust Enrichment' has been dealt with in recent cases of this Court, such as *Goindarajulu Naidu* v. *S. S. Naidu*[3], where a succinct history of this doctrine, particularly in relation to English and American systems of jurisprudence, will be found set forth. Reference may also be made to the Full Bench decision in *Muppudathi Pillai* v. *Krishnaswami Pillai and others*[4]. The doctrine was originally based in English Law upon the principle of assumpsit or 'had and received' and was declared by Lord Mansfield in *Moses* v. *Macferlan*[5]. It underwent certain changes through judicial interpretation, and came to be based more and more on the doctrine of restitution. In the United States of America, the same principle

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1. L.R. (1914) A.C. 932 at 954.
2. (1956) An.W.R. 911.
3. (1958) 2 M.L.J. 148.
4. (1959) 2 M.L.J. 225 : I.L.R. (1959) Mad. 929 (F.B.).
5. (1760) 2 Burr. 1005.

evolved through concepts of *assumpsit* and then of *quasi* or implied contract, to the final form of a doctrine of restitution (Amercian Re-statement). In this country, the principle was developed under sections 69 and 70 of the Indian Contract Act, and, as observed in *Mahalingam Chettiar* v. *Ramanathan Chettiar and others*[1]. "It is generally recognised that these sections (sections 69 and 70) are much wider in scope than the doctrine as applied in England and go far beyond it". *Goolab Chand* v. *Miller*[2], is an instance of the application of this doctrine, and a recent instance is *Nityananda Mudaliar* v. *Arunachalam Chettiar*[3], where the doctrine has been applied to the facts, and the contributions of Lord Mans field and of American Jurisprudence have been explained in detail. For our present purposes, we may take the doctrines of constructive fraud and unjust enrichment as complementary to each other; if we find that, in effect and substance, the first defendant company was unjustly enriched to the extent of about two lakhs, by means of a transaction with the plaintiffs (appellants), to whom the first defendant company stood in a fiduciary capacity, even if the form of the transaction was different in outward semblance as a transaction between the legal entities of the 'old company' and the 'new company' we would be justified in piercing through these forms to the reality, and in holding that the first defendant held their shares or interest in the new company constructively in trust for the appellants. This would be all the more so, where, as in this case, the classic signs and symptoms of constructive fraud are present. That is, where the fiduciary relationship is undeniable, where the context of a conflict between interest and duty is equally undeniable, where the plaintiffs (appellants) had no disinterested advice, legal or private, and where the analysis of facts discloses an 'unjust enrichment' of the constructive trustees.

We now proceed to the next point for determination, the true nature of fiduciary relationship and the existence or absence of it upon the dates when the impugned transaction was settled as between the parties. It is contended on behalf of the first defendant company that they were purely secretaries, not managing trustees of the estate; that they were given no wider responsibilities than those of secretaries working under the Board of Directors, and that, in respect of the attempted sale of the estate, they were not agents for sale. We consider that to regard the facts from this perspective of approach, is to misconceive the principle of 'fiduciary relationship' altogether. But, even upon such a narrow ground, it could be shown that what the first defendant company claims is not quite true. In the very agreement under which the first defendant took over as secretaries (Exhibit A-5), clause 2 is a general one giving the secretaries an apparently large power to devote their time to the business and affairs of the company in a sincere and faithful manner. Even if this is to be construed *ejusdem generis*, as the learned Subordinate Judge held, it would at least indicate that the secretaries (first defendant company) discharged wider functions than those of mere administrative assistants. Certainly, a case can be pieced out from the record to show that, during the period of the attempted sale of the estate, the first defendant company functioned in a manner very similar to that of an agent for sale as might be naturally expected from a concern of this standing and experience. But we would put the matter upon a wider, and an altogether different ground; that is, the true character of the principles of 'fiduciary relationship' as evident in the very extensive case law. How little this character ordinarilly derives recognition may be illustrated from an argument, actually advanced in the present case, to the effect that there could be no 'fiduciary relationship' between the appellants and the first defendant company, because the appellants were merely the shareholders of the 'old company' and distinct from that jural entity. Let us suppose, for a moment, that the entire body of shareholders of a private concern approach its solicitors for advice, and that, in consequence, the company itself buys certain property from the solicitor to its disadvantage, and at excess value, because the solicitor abused the confidence reposed in him. Could

1. App. No. 665 of 1948.
2. (1938) 2 M.L.J. 688.
3. (1957) 71 L.W. 50.

the solicitor then turn round and argue, in a suit to recover the 'unjust enrichment', that he gave the advice to certain individuals *qua* shareholders, and that, in consequence, there was no fiduciary relationship at all on that occasion? In other words, the argument is based on a fallacy. The fiduciary relationship may arise in the context of a jural relationship or it may not. Where confidence is reposed by one in another, and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence. Once it springs into existence, it is for the person benefiting by the transaction to show that the other party was at equal advantage, that nothing was concealed, that the other party had distinterested advice, and that the transaction itself was fair and without any element of 'unjust enrichment'. Where that burden is not discharged, the Courts will interfere to restore what has been taken away, to the extent to which it constituted 'unjust enrichment'.

The case law upon this entire subject is extensive. Cases differ upon the facts, though the leading principles are clear and explicitly stated. Again, the mere existence of 'fiduciary relationship' does not inhibit a transaction altogether. The trustee may deal with the *cestui que* trust, upon his peril to show that the transaction could be upheld, by the tests we have already indicated. We propose to set forth here certain of the text-book passages and decisions, in illustration of the principle and its application.

Moulton, L.J., said in re *Coomber*[1]:

> "They (fiduciary relationship extend from the relation of myself to an errand boy, who is bound to bring me back my change, upto the most intimate and confidential relationship which can possibly exist between one party and another, where the one is wholly in the hands of the other, because of his infinite trust in him."

Courts have refused to cabin and confine the principle within a particular category, or outward form. As Sheridan has observed (Fraud in Equity, page 88),

> "The fiduciary character of a person may be the consequence of a commercial or proprietary relation to another, or it may arise out of personal or domestic considerations".

Keer says (Fraud and Mistake, page 202):

> "The disability extends in general to all persons who, being employed or concerned in the affairs of another, acquire the knowledge of his property."

In the instant case, this disability arose from several vital considerations. The plaintiffs (appellants) were the shareholders of the company, who could take the decision to convey the properties either to first defendant company or to any new company promoted by them; in other words, first defendant company dealt with the appellants, knowing that they were the parties who had the power and the right to effect the transaction. The first, that is the 'old company' was a different jural entity makes no difference in the context of this real situation. The first defendant company were secretaries, exercising fairly wide powers and functions of looking after the estate under the directors. Both Miss Dorothy Wapshare and her brother reposed confidence in the company. They also reposed confidence in Mr. Thorne, who could act for the company, within limits, of course, as a trusted and important official in the concern. Further, the first defendant company were actively engaged in aiding the plaintiffs (appellants) to sell the estates. They were so conscious of the conflict between interest and duty, particularly when they themselves became possible competitors, that they actually expressed this embarrassment on one occasion. We are unable to see how it can be doubted, upon those facts, that a fiduciary relationship existed between the parties.

Of the English cases, we may refer to the following: In re *Coomber*[1], *Smith* v. *Kay*[2], *De Witte* v. *Addison*[3], *Morley* v. *Loghnan*[4], *Dofer* v. *Buck*,[5] and *Ahearne* v. *Hogan*[6], which last decision is interesting as it related to a doctor and a patient. We

1. L.R. (1911) I Ch. 723 at 728.
2. (1859) 11 E.R. 299.
3. 80 Law Times 207.
4. L.R. (1893) I Ch. 736.
5. (1865) 66 E.R. 921-924.
6. (1844) Drut. Sug. 310.

shall venture a brief observation upon each of these cases. In In re *Coomber*[1], it is interesting to note that no member of the Court was able to give a test regarding which particular fiduciary relationship would give rise to a presumption of undue influence, where the trustee beneffts. This shows in a striking manner the pervasiveness of the concept. In *Smith* v. *Kay*[2], the Court observed :

> " The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed (pages 310-311 ".)

De Witte v. *Addision*[3], was a case in which the eldest daughter of a man was induced to mortgage her reversionary interest in order to save her father from being adjudged bankrupt. The deed was set aside, and it is very significant to observe that this was one of the cases in which the person entering into the transaction had no independent legal advice. In *Morley* v. *Lognan*[4], observations are to be found to the effect that where the mental and physical condition of a person, though not amounting to incapacity, were such as to render him peculiarly amenable to influences, independent legal advice is absolutely essential "let the hand receiving it be ever so chaste" (757-758), etc. *Dover* v. *Buck*[5], was a case in which the transaction was actually upheld, because it satisfied every test of a constructive trustee, or of a formal trustee, dealing with the *cestui que trust*.

Of the Indian decisions, we might merely refer to *S. B. Singh* v. *A. R. Khan*[6], *Venkatachalapathi* v. *Guntur Mills*[7], which was, pertinently enough, a case of secretaries who had no interest in a mortgage, though they had the plenary power to enter into the transaction on behalf of the company. *A. Ibrahim* v. *Meyyappan*[8], *Ragunath* v. *Varjivandas*[9] and *India S. & R. Ltd.* v. *Estate of Ramalingm.*[10] In *D. Beuxite Company* v. *L. Hubbard*[11], the House of Lords held that a Solicitor was bound to make the fullest disclosure of fact to a client, and to deal with her fairly by every test, before his transaction with her could be supported.

Mr. Nambiyar, for the first defendant-company, draws our attention to certain passages in Leiwn on Trusts Kerr on Fraud, etc., as well as to cases in *Coles* v. *Trecothick*[12], *Knight* v. *Marjoribanks*[13], *Dover* v. *Buck*[5], for the position that this kind of transaction is not inhibited, that the trustee can purchase where there is no fraud, no concealment, no advantage taken, from the *cestui que trust*, and that inadequate consideration, by itself, is no ground for impeaching a transaction. We have already referred to the general principle that such transactions are not inhibited, but that the trustee must satisfy the Court with regard to the several tests laid down. The fact that an adequate price was not paid, would certainly lead to the inference that there was an 'unjust enrichment' of the trustee, and we are unable to agree that this is not important. There is only one case cited, viz., *Coles* v. *Trecothick*[12] in which inadequacy of price was not considered a sufficient ground, but that was in relation to the facts of that particular case, where the entire complex of facts indicates an inference opposed to 'constructive fraud'. The case-law has to be applied in such matters with great care, in order to see that what is merely illustrative of individual facts is not misinterpreted as laying down the law. We may give an instance here; Lord Esher, M. R. said in *Barnett* v. *South London Tramways Company*,[14] that a secretary was merely a servant, and that his duty was to carry out orders. This does not imply that first defendant-company had, in the present case, merely fulfilled such a role (which they obviously did not), or that they were not in fact exercising wider powers and responsibilities.

Regarding the absence of legal advice, or disinterested advice, which is a marked feature of this case, there is a passage in Halsbury (Second Edition, Vol XV,

1. L.R. (1911) 1 Ch. 723.
2. (1899) 11 E.R. 299.
3. 80 L.T. 207.
4. L.R. (1893) 1 Ch. 736.
5. (1865) 66 Eng. Rep. 921 at 924.
6. A.I.R. 1946 Oudh 129.
7. A.I.R. 1929 Mad. 353.
8. A.I.R. 1940 Mad. 285.
9. (1906) I.L.R. 30 Bom. 578.
10. (1953) 1 M.L.J. 577 : I.L.R. (1953) Mad. 1097 : A.I.R. 1953 Mad. 694.
11. L.R. (1923) A.C. 673.
12. 7 Revised Reports 167 (175) : (1804) Ch. 9 Vesey 234.
13. 83 Revised Reports, 189 : 2 Mac. & G. 10
14. L.R. (1887) 18 Q.B.D. 815 at 817.

section 492 at page 274), to which our attention has been drawn, that proof of independant legal advice "is not the only way of proving", "that the donor was acting independently of any influence". We also note that in *K. Bibi* v. *Mahaboob Bi*[1], Leach, C.J., pointed out that independent advice was not essential where the settlor was acting voluntarily and with full knowledge of the facts. Again, it is incontrovertible that independent advice need not necessarily be from a lawyer. But, where a fiduciary relationship exists, and a climate exists which was probably taken advantage of by the fiduciary, and there is an obvious element of 'unjust enrichment', the absence of such independent advice does become a material factor in judging the case.

We shall now proceed to the intricate question whether the present plaintiffs-appellants could maintain this suit, after the voluntary liquidation of the old company.

Mr. Nambiyar, for first defendant-company, lays down certain propositions about the law relating to corporations, which are well supported by authority. He argues that (1) a company is a legal entity quite distinct from the shareholders; (2) that shareholders *per se* have no rights in the properties of the company and (3) that they cannot sue while the company subsists, on behalf of the company, except under very limited and exceptional circumstances. These propositions are well-recognised, from *Gray* v. *Lewis*[2], onwards. We may also refer to *Foss* v. *Harbottle*[3], and *Burland* v. *Earle*[4]. In *Salomon* v. *Salomon*[5], which is still good law, as text-book writers have pointed out, the legal inference resulting from incorporation was affirmed. The company is not another name for the same person; the company is *ex hypothesi* a distinct "*legal persona*" (at page 42). These general principles have been recognised and re-affirmed in a series of Indian decisions. We might make reference here to *E. B. M. Company, Ltd.* v. *Dominion Bank*[6]; *Harihar Prasad* v. *Bansi Missir*[7], *Bacha F.* v. *Commissioner of Income-tax, Bombay*[8] *Vaidyanatha* v. *Indian Bank*[9]. It was observed *Burland* v. *Earle*[4] at 93 that

> "in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself."

The Supreme Court observed in *Sha Mulchand* v. *Jawhar Mills Ltd.*[10]

> "It must not be overlooked that the company stood dissolved on that date, and Sundaram Iyer had no authority to do anything on behalf of the company!".

But we might immediately state that the doctrine is not so unqualified, as these decisions might make us suppose, at the first blush For instance even during the life-time of the corporation, a recalcitant majority might prevent a minority from taking action on behalf of the company, which action is essential in the interests of equity and justice, or fraud might have occurred, either on the part of the directors who are quasi-trustees, or of other persons, and the company might not be willing to sue. In such contingencies, the power even of a minority of shareholders to sue has been recognised by Courts. We think it is sufficient to refer, in this context to *Burland* v. *Earle*[4], where there is explicit authority for the view that complaining shareholders may sue in their own names, where the acts complained of are fraudulent or *ultra vires*. Also see *Menier* v. *Hooper's Telegraph Works*[11]. In the present case, we find that the directors of the old company who were quasi trustees, did later become major shareholders or partners in the new company. We find constructive fraud perpetrated by the first defendant-company, which has led to their unjust enrichment. The divices of transactions between the old and new companies, as distinct legal entities, are transparent, and cannot help to conceal or

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1. (1943) 2 M.L.J. 99: I.L.R. (1944) Mad. 181: A.I.R. 1943 Mad. 677 (F.B.).
2. L.R. (1873) 8 Ch. A. 1035.
3. 2 Hare 461.
4. L.R. (1902) A.C. 83.
5. L.R. (1897) A.C. 22.
6. A.I.R. 1937 P.C. 279 at 284.
7. I.L.R. 11 Pat. 174.
8. A.I.R. 1955 S.C. 74 at 77.
9. (1955) 2 M.L.J. 99: A.I.R. 1955 Mad. 486.
10. (1953) S.C.J. 68 : (1953) 1 M.L.J. 364 : 1953 S.C.R. 351 : A.I.R. 1953 S.C. 98 at 102.
11. L.R. (1874) 9 Ch. 350.

suppress the fraud. Under such circumstances, could not the plainiffs (appellants) have sued during the lifetime of the old company and prior to its dissolution? The answer is that they could have done so, even if they sued in their own names, and the company *per se* had refused to sue. Again, would there not have been an equitable estoppel, which would prevent the "fraudulent" trustee (first defendant-company) from putting forward the claim that the suit was not competent because the company is juristically distinct from its shareholders? Surely, such an estoppel would have operated, and the Courts would have rendered justice, if the constructive fraud had been established.

The matter is somewhat different with regard to a company which has gone into voluntary liquidation. Mr. Nambiyar appears to assume in his arguments that the shareholders cannot at all sue after the dissolution of the "old company", because its legal personality has come to an end, and that this is upon stronger ground than the argument that the shareholders cannot ordinarily sue on behalf of a coporation; while it is alive. On the contrary, our analysis of the matter leaves us in no doubt that this kind of a suit by ex-shareholders, after the dissolution of the company, to recover assets concealed by fraud, stands on a totally different footing. There are indications in the Indian Company Law that the shareholders are the true residuary legatees of even the debts and undistributed or concealed assets of a defunct corporation unlike the case in England, where the Crown is the legatee, upon the doctrine of *bona vacantia*, statutorily recognised. Hence with regard to India at least, such a suit by the ex-shareholders of a dissolved corporation seems to be perfectly maintainable. Particularly in the case of fraud, equity and justice require that such plaintiffs ought not to be non-suited by a formal objection taken by a fraudulent trustee. We can certainly comprehend that the statute of limitation might bar such a suit; but short of this, we are unable to see how a 'fraudulent' trustee can sustain an objection of this character to the form of suit. As far as the 'new company' (15th defendant) is concerned all that it can plead is that it has *bona fide* developed the estates as a distinct legal entity, and that it is not liable to reconvey the corpus to the appellants. This branch of the argument certainly deserves consideration, and we will deal with it in due course.

Thus, upon this aspect, we would hold that even during the liftime of a legal *persona* like a corporation, its shareholders can maintain a suit for acts *ultra vires*, acts of fraud, etc. This is well-supported by authority. After the dissolution of the corporation, the Indian Company Law appears to recognise the shareholders as the residuary legatees of undistributed or concealed assets, debts due to the corporation not recovered by the liquidator, etc. In England, the doctrine of *bona vacantia* is statutorily emobdied, and the Crown is the heir to the legal *persona* of the corporation, when it comes to an end. In American Law, it has been frankly and fully recognised that the shareholders succeed to the corporation after its dissolution and could maintain such an action at law.

Before proceeding to further discussion of this aspect, we would refer briefly to the doctrine of 'piercing the veil', of a corporation personality, to which some reference will be found in *Jawhar Mills* v. *Sha Mulchand & Co.*[1] This development of judicial interperetation has been necessitated by the exigencies of modern industrial life. The rigorous formalism of *Salomon* v. *Salomon*[2], no longer holds the field. In Fridman's Legal Theory, (3rd Edition, p. 400) the development will be found fully discussed. Reference is made to English cases, such as *Smith Stone & Knight* v. *Birmingham Corporation*[3], embodying this doctrine. In Stone's 'The Province and Function of Law', at page 202, the learned author makes mention of other examples "of the same frankly creative approach". We would merely observe in passing that, though this doctrine is not directly relevant to the present facts, except in the limited sense that it enables us to 'pierce the veil' of the new company (15th defendant) in its own interest, and for its own advantage, still it is profoundly suggestive.

1. (1949) 2 M.L.J. 88 : A.I.R. 1951 Mad. 572.
2. L.R. (1897) A.C. 22.
3. 161 L.T. 371.

The law is not a static, but is a dynamic process. The task of judicial interpretation is not merely to reiterate. Judicial interpretation can be creative. But, of course, within the limits of the most rigorous discipline, and in entire harmony with the boundaries of statue law, and previous growth. We are induced to make these observations because we find nothing in law in this country which prevents or prohibis the ex-shareholders of a defunct corporation, from maintaining an action of this kind. Where such an action is being maintained, in order to recover the fruits of constructive fraud from a trustee, we do not think that it is open to the trustee to resist the suit on the rigidly formal ground that the ex-shareholders cannot represent the defunct corporation.

In *Bacon* v. *Robertson*[1], it has been held that part of the stock-holders may maintain an action in equity against the trustee of a dissolved State Banking Corporation. In *Taylor* v. *Standard Gas & E. Co.*[2], it was observed that the doctrine of corporate entity will be disregarded, where to do otherwise would involve fraud or injustice. In American Jurisprudence (Vol. 13, page 1197 *et seq.*) the rule has been laid down that after the dissolution of a corporation, its property passes to its stock holders, subject to the payment of debts. Learned counsel for first defendant-company draws our attention to certain dicta that dissolution puts an end to the existence of a company. There is a passage from Ghosh's Indian Company Law (10th Edition, Part II, Page 17 at paragraph 1635) quoting Viscount Cave to the effect that, after dissolution, the company "no longer exists as a separate entity capable of holding propeity or of being sued in any Court". In *Sha Mulchand & Co.* v. *Jawahar Mills Ltd.*[3], it is observed that "a person who was a member of a dissolved company has no *locus standi*." But these statements of law do not really touch the crux of the matter now before us. It is true that under section 559 of the new Companies Act, 1956 (which is equal to section 243 of the old Companies Act and which is identical with section 352 of the English Companies Act, 1948), a company could be revived or restored to existence by the Court within two years after dissolution, under appropriate circumstances, and upon the motion of parties affected. But we are unable to concede the argumet of Mr. Nambiyar that after this *locus penitentiae*, none can sue on behalf of the defunct corporation, even in a case of fraud. First of all, the fraud itself might be discovered more than two years after the dissolution, and the argument might work havoc in certain cases, where a fraudulent trustee might take pains to evade the action for just this period. Secondly, this has nothing to do with the question of succession to the assets of a legal persona like a company, after the death of that person. That question must be solved, for the argument is irrefutable, that the law cannot leave a hiatus with no one entitled in law to the estate. In England, the Crown is so entitled, and section 354 of the English Act is to the following effect :

> "Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution. . . . . shall, subject and without prejudice to any order which may at any time be made by the Court under the two last foregoing sections, be deemed to be *bona vacantia*".

In Buckley on "Companies Act" (13th Edition) a very interesting case is cited where a company was wound up voluntarily, and the properties were allotted between the three shareholders by agreement. An order was passed vesting the properties in the Crown in trust for the three shareholders, "under the general law, since the legal estate must be in some one".

We have carefully scrutinised the procedure in Indian Company Law relating to undistributed dividends, unclaimed assets, etc., under section 244 (*b*) of the old Companies Act (which is equal to section 555 of the new Companies Act, 1956 and identical with section 343 of the English Companies Act, 1948), and also the rules made thereunder. This scrutiny shows us that the shareholders have been treated in Company Law of this country as persons entitled to the residue of the assets of a company, during the process of liquidation. Further under section 555 (6),

1. (1855) U.S. (S.C.R.) : 15 Lawyers Edition 499.
2. (1938) U.S. (S.C.R.) : 83 Lawyers' Edition page 669 at 676 : 306 U.S. 307-324.
3. (1953) S.C.J. 68: (1953) 1 M.L.J. 364: (1953) S.C.R. 351: A.I.R. 1953 S.C. 98 at 99.

sub-clause (7) (*a*), sub-clause (7) (*b*) and sub-clause (8), it is clear that an ex-shareholder might claim to be entitled to moneys in the Company's Liquidation Account, and that the transfer to the general revenue of the Central Government is to take place only after a period of 15 years, during which claims can be preferred. Even after this, the claim can be dealt with and orders passed for a refund. This very definitely shows that the intention of the Legislature in this country was never to recognise the doctrine or principle of *bona vacantia.* It is unfortunate that there is a lacuna in new Companies Act, 1956, and we are of the view that a provision should be enacted along the lines of the English section 354, and in conformity with the development of law in the United States, vesting the right to properties of a defunct corporation in the general body of the ex-shareholders, or the surviving members thereof. We conclude, upon this analysis, that an action of this kind is not prohibited by law, if it is otherwise in time, and neither the first defendant-company nor any of the ex-directors of the old company who have benefited by this transaction through constructive fraud can be permitted to plead this formal defence in bar of suit.

The remaining two questions of (1) laches on the part of the appellants and (2) of limitation, may be now dealt with.

As regards laches, as already observed by us, the authorities have never proceeded to the length of saying that merely because of laches, party should be held disentitled to relief. Passages from Kerr and Pomeroy, cited by the learned counsel for the first defendant-company merely proceed to the length of saying that, in certain circumstances, and in exercise of the judicial discretion vesting in Court, laches may be held sufficient to bar a party from suit. The last word upon this matter was probably spoken by Sir Barnes Peacock in *Lindsay Petroleum Company* v. *Hurd*[1],

> "Now, the dictrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

A mere delay or lying by, short of a bar of limitation, was held not to disentitle to relief. Lord Blackburn said in *Erlanger* v. *New Sombrero Phosphate Company*[2], and cited in *Rochefoucauld* v. *Bowsted* [3]:

> "I have looked in vain for any authority which gives a more distinct and definite rule than this ....it must always be a question of more or less, depending on the degree of diligence which reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it."

In the present case, we are taking full congnizance of the laches, of standing by, and delay on the part of the appellants. We are not accepting it as a sufficient explanation that they awoke to their rights when they read the *Mail* article already referred to, and consulted Dr. C. P. Ramaswami Iyer. On the ground of *laches* we disentitle the appellants to the reliefs that they prayed for, either for possession of any part of the *corpus*, or for any re-conveyance from the new company of any part of it. We hold that the estates have been developed by the new company, considerably beyond their original form and value, while the appellants stood by, and that, hence, they can get no relief in this suit upon the basis of re-conveyance, or a decree for possession of any part. Further, though we find that there was unjust enrichment to the extent of two lakhs, as nearly as we can judge, we are holding the appellants entitled only to a lesser amount of Rs. 1½ lakhs. Thus, on the ground of laches, we consider we have adequately punished the appellants by barring certain reliefs, and that it would not at all be equitable to dismiss the suit altogether on this ground.

The issue of limitation has also been argued at some length, and a few precedents have been cited. But the matter seems to be fairly simple, and we have no ground

1. (1874) L.R. P.C. Appeals, Vol. V, 221 at 239.
2. (1878) L.R. 3 App. Cases 1218 at 1279.
3. L.R. (1897) 1 Ch. 196 at 211.

to consider that this suit is time-barred. An initial difficulty arose with regard to the frame of the suit, and, particularly, the very unfortunate manner in which the reliefs were worded in the plaint. Though the plaint itself contained sufficient allegations, and traversed the facts sufficiently, to make it clear beyond doubt, that the appellants, were seeking to recover a possessory interest, to recover possession of the corpus either by a decree for possession or through compelling a re-conveyance, the reliefs were so unfortunately worded as to give rise to a possible interpretation that this was an equitable action to recover the assets, to which Article 120 of the Limitation Act applied. Since that Article provides for limitation of only 6 years, the suit would obviously be time barred on this basis. Mr. Nambiyar has drawn our attention to three decisions, viz., *India Sugars & Refineries Ltd.* v. *Estate of V. Ramlinga*[1], *Gurudas Pyne* v. *Ram Narain Sahu*[2] and *Devarajulu Naidu* v. *Jayalakshmi Ammal*[3], for the view that Article 120 was the residuary Article which applied to such claims of an equitable character, and that the suit must be in time with reference to this Article. But, due allowance must certainly be made for unhappy or unfortunate terminology, particularly in the case of *mofussil* pleadings. We are thoroughly satisfied from a scrutiny of the allegations in the plaint, of the several returns made by the office of the Court when the plaint was presented, and the actual issues framed in the suit, that this was understood to be, in essence, a suit for recovery of a possessory interst in immoveable properties, to which residury Article 144 would apply, if not Article 142. We have no doubt at all that the parties understood the suit as implying a claim for possessory interest, and that they proceeded to trial upon this basis. Again, section 3 of the Limitation Act makes it clear that it is the plaintiff who must *prima facie* establish that the suit is in time, with reference to the allegations that he makes in the plaint, and irrespective of the defences which might be later set up. Of course, we are not awarding to the appellants here, either the relief of possession or vesting of any part of the *corpus*, or the relief of reconveyance. But that is not because the bar of limitation applies, for, if it did, the suit would be barred altogether, but because, in equity, we think that we ought to grant a far more limited relief in the form of a charge on certain assets. Mr. Nambiyar has, subsequent to the arguments, filed an application with a copy of a sale-deed recently executed by the appellants in respect of the Naduvattam estate, which plaintiffs originally undertook to re-convey, if the A to D Schedule properties were to be handed back to the old company revived (16th defendant). This, according to him, shows that appellants were not serious about this undertaking in the plaint. But we do not think that we can go into this queston, for obvious reasons. The sale-deed is *post litem motam*, and we have no idea at all of the surrounding circumstances, and the true understanding between the parties to it. We, therefore, think that it has to be ignored altogether, particularly as we are not granting the appellants any reliefs relating to the actual *corpus* of the estate.

Learned counsel for first defendant has strenously contended that the suit is not sustainable under Article 144, upon the authority of *Rani Chhatra Kumari Devi* v. *Prince Mohan Bikram Shah*[4]. We have already pointed out that this suit, as we interpret it, would really be for the recovery of a possessory interest under Article 144; it is not in dispute that that is the Article which applies to suits for possession of immovable property, or an interest therein, not otherwise provided for (see *Rama Bai* v. *Raghunath*[5]. As observed by Chagla, C.J., in *P. N. Films Ltd.* v. *Overseas Film Corporation Ltd.*[6], the Limitation Act deprives a party of a valuable right, and, ordinarily, a benevolent construction, a construction favourable to the party whose right may be taken away, should generally be adopted. This is especially the case with regard to pleadings and their interpretation. But, assuming that the frame of the suit was under Article 144, we are quite unable to see how the suit was barred by limitation. The learned Subordinate Judge thought it was barred by limitation under this Article, not because of any intrinsic feature of the case or the pleadings, but because he calcula-

1. A.I.R. 1953 Mad. 694 at 695.
2. (1884) I.L.R. 10 Cal. 860 : L.R. 11 I.A. 59.
3. 54 L.W. 115 : A.I.R. 1941 Mad. 767.
4. (1931) 61 M.L.J. 78 : L.R. 58 I.A. 279 : I.L.R. 10 Pat. 851 (P.C.).
5. A.I.R. 1952 Bom. 106.
6. A.I.R. 1958 Bom. 10.

ted limitation, not from the sale-deeds, Exhibits A-1, A-202 and B-368, as would normally be the case, but from 10th January, 1938, when the first defendant-company was put in possession of D and A Schedule properties, and even from 1st November, 1937, under the terms of the offer of the first defendant, Exhibit B-23, accepted and adopted in the agreement Exhibit AB-45. Apart from the fact that the possession of the first defendant was certainly permissive during this period, it is obviously illegitimate to tack on two different periods of possession by different parties under totally distinct sources of title or interest, to compute a period of adverse possession of the whole. But this is not the argument that is now before us. The argument is that the suit may be in time if Article 144 can apply to the facts, but that Article 144 *cannot* apply, because the appellants are not the old company, because they are not 'owners' seeking to recover the possessory interest from a party in adverse possession. *Rani Chhatra Kumari Devi* v. *Prince Mohan Bikram Shah*[1], is heavily relied on for this view.

We consider that this argument is based upon a misconception. Article 144 no doubt applies to a suit by an 'owner' seeking to recover a possesory interest against the party holding adversely to the true title. But it is also the residuary Article which applies to every kind of suit to recover a possessory interest, against the person who has no answer to that title or claim unless it is the answer of adverse possession, which must, of course, be tried on the merits. The facts in *Rani Chhatra Kumari Devi* v. *Prince Mohan Bikram Shah*[1], must be carefully scrutinised. That was a case in which the appellants sued upon a contract between a testator and his natural father concerning a testament of 1903, the effect of which was, according to the appellant to impress the property with the character of an express trust in his favour. The learned Judges observed that the suit would fail even if the contract relied on had been established, for the law in India did not recognise an equitable estate as distinct from a legal estate (*Tagore* v. *Tagore*[2], and *Webb* v. *Macpherson*[3].) The true remedy of the beneficiary was to call upon the trustee to convey to him, and that remedy was barred in that case under Article 120 of the Limitation Act. In the present case, we cannot further confuse the issue by reviving the argument about the incapacity of the plaintiffs to sue, since they are merely the ex-shareholders of the old company. Since we find that they are not barred from such a suit, as persons entitled to the assets of the old company, or at least to pursue its assets in the hands of the fraudulent trustee this argument has no force. The plaintiffs sued to recover a possessory interest or the *corpus* itself, because they maintained that this corpus had been the subject of a fraudulent sale, virtually in favour of a fiduciary, who had exploited the situation of trust. They can hence claim to be the 'owners' in the sense that they are the heirs at law of the estate of the defunct 'old company' after its legal *persona* has come to an end, and we have already seen that in Indian Company Law there is an implicit recognition of this principle, while it is nowhere explicitly barred. Such a suit was certainly in time, and was not barred. Nor is the suit barred by adverse possession, whether of the new company, or of anyone else. We, therefore, hold that the suit is not barred by limitation.

We have already indicated that the plaintiffs (appellants) are entitled to succeed in this appeal, at least as against the first defendant-company, to the extent to which its assets (shares) are held in the new company; 'piercing the veil' of the corporate personality of the new company (15th defenant) for this purpose. The same argument would apply to the ex-directors of the old company, who now hold shares in the new company. But it appears that those who held such shares are dead, and that their legal representatives are not on record. Under the circumstances, we allow the appeal in part by directing that a decree be now passed for Rs. 1½ lakhs in favour of the plaintiffs-appellants. This will be a charge on the shares held by the first defendant-company in the new Company. The costs awarded by the lower Court will stand undisturbed. In regard to costs in this Court, the plaintiffs are allowed insti-

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1. (1931) 61 M.L.J. 78 : L.R. 58 I.A. 279 : I.L.R. 10 Pat. 851 at 870.
2. L.R. (1872) I.A. (Supp.) 47, 71.
3. (1903) I.L.R. 31 Cal. 57: L.R. 30 I.A. 238, 245.

tution fee, printing charges and advocate's fee of Rs. 2,000. In other respects the appeal will stand dismissed without costs.

Before parting with this appeal, we wish to place on record our high appreciation of the able, lucid and informed arguments at the Bar of Messrs. V.P. Raman and O.T.G. Nambiyar who spared no pains to place before us all the relevant authorities which considerably lightened our labours in disposing of a matter, raising several interesting and subtle question of fact and law.

V.S. — *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDDRA IYER.

K. M. Mohamed Abdnl Khader .. *Appellant**

v.

The State of Madras represented by the Secretary to Government, Revenue Department and another .. *Respondents.*

Madras General Sales Tax Act (IV of 1939), *section* 19 (4) *and Turnover and Assessment Rules,* 1939, *rule* 16 *and Madras General Clauses Act (I of* 1891), *section* 7—*Rules framed under Act IV of* 1939—*Non-compliance with the rule as to previous publication of the rules—Validation effected by section* 7 (e), *General Clauses Act—Scope and extent of—Act I of* 1957, *section* 9—*Validation of assessments under—Extends only to assessments of* (1955-1956)—*Interpretation of Statutes—Meaning to be given to every word used—Repetition and superfluity in language—When to be imputed.*

Section 7 (e) of the Madras General Clauses Act would validate the rules purporting to have been made in exercise of a power to make Rules in case where there is non-compliance with the mandatory provisions as to previous publication of the rules contemplated under section 19 (4) of the Madras General Sales Tax Act.

Section 7 (e) of the Madras General Clauses Act states that the final publication in the Official Gazette would be conclusive proof of the Rules having been duly made. On the terms of section 7 (b) and read with the definition of conclusive proof under section 4 of the Evidence Act it would not be competent for the Court to embark on enquiry as to whether the Rules have been duly made.

Section 7 of the Madras General Clauses Act applies to all cases of an enactment coming within Chapter IV, where a power to make rules is expressed as subject to the condition of the rule being made after previous publication. The words are of general importand will include not only a case of rules which have to be promulgated after previous publication but also those which have to be promulgated after the minimum period of previous publication.

Section 19 of the General Sales Tax Act expressly provides for the making of the rules not only in regard to the subjects mentioned in the section but also those allowed or required by the Act to be prescribed.

It cannot be said since rule 16 of the Turnover and Assessment Rules being one coming under section 3 (4) of the General Sales Tax Act the procedure to be followed would be one indicated in the Proviso thereto that there need be only final publication under section 19 (5) no previous publication is necessary.

Section 3 (4) of the General Sales Tax Act on its terms only provides for the subject-matter on which the rules have to be made namely the determination of the turnover. There is nothing in section 3 (4) of the Act to designate the authority to make the rules. The authority to whom the duty of framing the rules is entrusted is specified only by section 19. Rule 16 of the Turnover and Assessment Rules even on the basis that it relates to only turnover and assessment under section 3 (4) would be one allowed or required by the Act to be prescribed and would come within the powers granted by section 19. Since rule 16 in essence a changing provision prescribes not merely the mode of determination of the turnover but fixes the point at which the sales or purchases could be taxed, he rule would come under section 5 (vi) of the Sales Tax Act as well. The rules prescribed under section 3 of the Act would have to comply with two conditions, conformation to the provisions of section 19 (4) and receiving the approval of the Legislative Assembly.

Section 9 of Act I of 1957 contains no general words to warrant the extension of validation effected by the section to assessments other than for the year (1955-1956).

It is a general rule of construction that every provision or word employed by a statute was intended to have effect or be of some use and a tantology or superfluity of language should not be imputed to the legislation except for necessity.

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*W.A. No. 40 of 1958 and W.P. No. 282 of 1957. 1st December, 1959. (10th Agrahayana, 1881, Saka).

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopala Ayyangar, dated 25th November, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1546 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the assessment proceedings in Assessment No. A 3. 2385 of 1956-57, dated 30th November, 1956, on the file of the Deputy Commercial Tax Officer, Dindigul II and quash the same.

M. K. Nambiar, for *T. T. Srinivasan* and *A. N. Rangaswami*, for Appellant in W.A. No. 40 of 1958.

T. S. Krishnamoorthy Ayyar and *R. S. Venkatachari*, for Petitioner in W.P. No. 282 of 1957.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Government Pleader (*K. Veeraswami*), for Respondents in both.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The above appeal, the petitions and the tax case are filed by several dealers in hides and skins and they raise a common question regarding the validity of rule 16 of the Turnover and Assessment Rules promulgated by the Government in G.O. No. 2733 (Rev.), dated 3rd September, 1955, by virtue of its power under section 19 of the Madras General Sales Tax Act, 1939, (which shall hereafter be referred to as the Act). Recently, we had occasion to consider in W.A. No. 15 of 1958 and W.P. No. 400 of 1957 the validity of the rule in connection with the objections as to its (1) not having been reserved for the assent of the President under Article 286 (3) of the Constitution, and (2) contravening Article 304 of the Constitution, being discriminatory in its operation with respect to goods produced in this State as against those coming from other States. We held that the two grounds of objection were untenable and that the Rule was valid.

A third line of attack is now made on the rule on the ground that it has not been made after conforming to the requirements prescribed by section 19 of the Act. We have set out in detail in our judgment in W.A. No. 15 of 1958 and W.P. No. 400 of 1957, the circumstances under which the new rule had to be substituted for the previous one, which, by reason of a defect in draftsmanship did not reach the sales or purchases effected by a large class of dealers in hides and skins. The impugned rule formed part of a number of amendments notified in 1955. The State Government which is invested with the power to make rules under section 19 of the Act, effected the amendments and substitutions to the Turnover and Assessment Rules, 1939. The Rules were duly placed on the table of the Legislative Assembly, as required by section 3 (4) of the Act. After obtaining the approval of the Assembly, they were finally published in the *Fort St. George Gazette* on 7th September, 1955. Section 19 (4) of the Act, which was in force on the date when the Rules were framed (that provision having been repealed since then by Act I of 1957), provided that there should be a publication of the Rules earlier for a period of not less than four weeks, presumably for eliciting public opinion. But, unfortunately, there was an omission to publish the rules at the earlier stage, in accordance with the provisions of section 19 (4). For the assessees, it is contended that the non-compliance with the provisions of section 19 (4), which is mandatory, would be fatal to the validity of the Rules.

To appreciate the contentions raised in the present case, it is necessary to set out the relevant provisions of the Act, as it stood on the date when the Rules were promulgated.

Section 2 (f)—" 'Prescribed' means prescribed by Rules under this Act ".

Section 3—(1) "Subject to the provisions of this Act (*a*) every dealer shall pay each year a tax on his total turnover for such year.

(*b*) the tax shall be calculated at the rate of three pies for every rupee of such turnover......

(4) for the purpose of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed :

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly ".

Under section 5 of the Act, certain exemptions and remissions were granted. In regard to certain transactions there was a total exemption from sales-tax. In regard to certain others, there was a partial exemption by fixing a single point in series of sales, for attracting tax liability. Sale of hides and skins comes under the exemption granted by section 5 (*vi*).

"*Section* 5 (*vi*).—The sale of hides and skins, whether tanned or untanned, shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be prescribed ".

Section 19 confers the power to make Rules.

Section 19 (1)—" State Government may make Rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such Rules may provide for—

(*a*) all matters expressly required or allowed by this Act to be prescribed "

Section 19 (2) (*b*) to (*i*) specify certain subjects on which the Rules could be made.

Section 19 (4)—" The power to make Rules conferred by this section shall be subject to the conditions of the Rules being made after previous publication for a period of not less than four weeks".

Section 19 (5)—" All Rules made under this section shall be published in the *Fort St. George Gazette*, and upon such publication shall have effect as if enacted in this Act ".

As stated before, the revised Turnover and Assessment Rules notified in G.O. No. 2733, Rev., dated 3rd September, 1955, were not published under section 19 (4), but there was only a final publication of the Rules under section 19 (5) on 7th September, 1955, after the approval of the Legislative Assembly. The question for consideration is whether non-compliance of the provisions of section 19 (4) would invalidate the Rule. The question came up for consideration before Rajagopala Ayyangar, J., in a batch of petitions filed under Article 226 of the Constitution, W.P. Nos. 14, etc., of 1958. The learned Judge was of the opinion that non-compliance with the provisions of section 19 (4) of the Act would be fatal to the validity of the Rules and accordingly declared the new rule 16 invalid.

It cannot be disputed that the provisions of section 19 (4) are not merely directory : previous publication being made a condition for the exercise of the power to make the Rules, they would be mandatory. The learned Advocate-General, who supported the validity of the Rule, contended that the provisions of section 19 (4) would govern only the Rules made under the authority granted by section 19 and not those made under the other provisions of the Act. It was pointed out that while the terms of section 19 (5) which related to the final publication of the Rules, would comprehend all Rules whether made under section 19 or under other provisions of the Act, those of section 19 (4) would relate only to the former category. A rule for the purpose of determining the turnover like Rule 16, being one coming under section 3 (4), the procedure to be followed would be one indicated in the Proviso thereto, subject to the final publication under section 19 (5), and no question of publication under section 19 (4) would arise.

Section 3 is a charging provision : Under it the charge is imposed on the turnover for each year such turnover being left to be determined by the Rules that may be prescribed. If the provisions of section 3 are to be interpreted in the light of the statutory definition of the word " prescribed ", it would follow that the turnover would have to be determined under the Rules made under the Act, that is, under section 19.

It was, however, contended on behalf of the State that the interpretation of the term, "prescribed", in section 2 (*f*) could not apply to the term in section 3 (4), as that section itself empowers the making of Rules to determine the turnover, and that the authority of section 19 for the purpose would be otiose. We cannot, however,

agree with the contention. Section 3 (4), on its terms, only provides for the subject-matter on which the Rules have to be made, namely, the determination of the turnover. There is nothing in section 3 to designate the authority to make the Rules. The authority to whom the duty of framing the Rules is entrusted is specified only by section 19. That apart, section 19, expressly provides for the making of Rules not only in regard to the subjects mentioned therein (*see* section 19 (2), clauses (*b*) to (*i*), but also those allowed or required by the Act to be prescribed (*see* section 19 (2) (*a*)). A turnover rule under section 3 (4) would be one allowed or required by the Act to be prescribed, and would come within the powers granted by section 19. But it was contended that there being a specific provision for the rule under section 3 (4), the provision under section 19 (2) (*a*) should be held to be one made *ex abundante cautela*, and that, notwithstanding that provision, a rule framed under an authority given under the other provisions of the Act should be held not to derive its support under section 19.

It is a general rule of construction that every provision or word employed by a statute was intended to have effect or be of some use, and a tautology or superfluity of language should not be imputed to the Legislature except without necessity. *Prima facie* a statute is not supposed to use words unnecessarily. In *Hill* v. *William Hill (Park Lane) Ltd.*[1], Viscount Simon observed at page 546:

"It is to be observed that though a Parlimentary enactment (like Parliamantary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once this repetition in an Act of Parliamant is not to be assumed. When a Legislature enacts, a particular phrase in a Statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should if possible be given to every word in the statute implies that unless there is good reason to the contrary the words add something which has not been said immediately before".

These observations would apply with greater force when there is an express provision like the one in section 19 (1) (*a*) of the Act. The provisions of section 3 (4) enact that the determination of the turnover on which the tax is to be levied was to be under the Rules to be framed. It prescribes the subject-matter of the Rules. Though in one sense it may be said to confer the power to make the Rules as well, the authority to do so is conferred only by section 19. Therefore, a rule under section 3 (4) would be one made under section 19 as well. This was the view taken by this Court in *Rangaswami Chettiar & Co.* v. *Government of Madras*[2], to which one of us was a party. At page 232, Rajagopala Ayyangar, J., observed :—

"The net result of these provisions, therefore, is that in regard to the Rules under section 3 (2) regarding the determination of turnover the procedure prescribed both by the proviso to that sub-section as well as that pointed out in section 19 (4) have to be followed. In making this observations we have in mind the procedure prescribed by section 19 (4) which is attracted to the Rules made under section 3 (2) by reason of the inclusion in section 19 (2) (*a*) of ' all matters expressly required or allowed by this Act to be prescribed."

In *Sreeramulu Chetty* v. *State of Andhra*[3], a Full Bench of the Andhra High Court held that sub-sections (4) and (5) of section 3 merely provided for the determination of the turnover and assessment levy and collection of taxes, in accordance with such Rules as might be made under the Act, but that they did not specify the authority empowered to make Rules, prescribing the matters referred to therein, and the authority empowered to make Rules under sub-sections (4) and (5) was the authority referred to in section 19, namely, the State Government.

It was sought to be contended that that view would lead to a conflict of procedure, as that prescribed under the Act for the Rules under section 3 (4) was different from that prescribed under secrion 19. It was pointed out that section 3 (4) contemplated and directed coming into force of the Rules after being approved by a resolution of the Legislative Assembly. The words of the section, according to the learned Advocate-General, would postulate that the Rules had been completely made before they were so placed on the table of the House of Legislature, whereas under section 19 (5) all Rules made under section 19 would have effect on the publication in the Gazette,

1. L.R. (1949) A.C. 530.
2. (1957) 8 S.T.C. 222 (232).
3. (1958) 1 An. W.R. 268 : 9 S.T.C. 215 (F.B.).

and that, therefore, the two procedures cannot be cumulative. We are unable to see how there could be any conflict in the procedure prescribed by section 3 (4) and section 19. What section 19 (4) contemplates, is the publication of draft Rules, giving an opportunity to the interested parties to show cause against them. After that stage has passed, a Rule, if made, under section 3 (4) could be placed before the Legislature and after its approval published under section 19 (5) in the *Fort St. George Gazette*. It is contended that this is not authorised by the terms of section 3 (4), which contemplates the placing before the Legislature of a rule complete in all other respects. Even assuming that the Proviso to section 3 (4) contemplated a duly framed rule and not a mere draft rule, we are of opinion the rule could first be published under section 19 (5) and thereafter placed before the Legislative Assembly. The Rule though made a part of the Act after the publication will come into force only on its being approved by the Assembly. It would, therefore, follow that section 19 (4) would apply to the Rules framed by the Government for the determination of turnover under section 3 (4). We agree with the observations of Rajagopala Ayyangar, J., in his judgment in W.P. Nos. 14, etc., of 1958 that

> "the prescription under section 3, which is what rules 15 and 16 of the Turnover and Assessment Rules are, must comply with the double condition, namely, conformation to the provisions of section 19 (4) and receiving the approval of the Legislative Assembly."

We have proceeded on the assumption that rule 16 is a mere turnover and assessment rule under section 3 (4); but it is not so. The rule prescribes not merely the mode of determination of the turnover, but fixes the point at which the sales or purchases could be taxed. That would mean that is a Rule under section 5 (*vi*) as well. Mr. M. K. Nambiar, the learned counsel for the assessees, contended that in essence rule 16 is a charging provision and not a mere Rule for the ascertainment of turnover. The learned counsel is supported in his contention by a number of decisions of this Court. It is, however, unnecessary to consider these aspects of the question, as we are of opinion, that, even if rule 16 is taken as coming solely under section 3 (4), it would still be a Rule made under section 19, that the provisions of section 19 (4) would apply to it, and that, for a valid exercise of the rule making power, there should be a publication thereunder.

It was next contended on behalf of the State that, whatever might be the defect in the promulgation of the Rules, the provisions of section 9 of the Madras General Sales Tax Act, etc., amendment Act I of 1957, would render them valid. Section 9 which purports to validate the assessment and levy of tax and licence fees for 1955-56 runs :—

> "Tax may be assessed or collected and licence fees levied or collected for the year 1955-56 notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939, and the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 and all assessments made, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made collected or levied as the case may be, as if those rules, as amended, were in force at all relevant times."
>
> (Proviso omitted).

The argument that was urged on behalf of the State was that, although the object with which section 9 was enacted was to validate the assessment, etc., of 1955-56, the language employed by the Legislature would be wide enough to validate the Rule for all time, and that its operation could not be limited to the assessment for the year 1955-56 alone.

Before considering the contention, it is necessary to refer briefly the context in which that section was enacted. The revised Turnover and Assessment Rules, published in the *Fort St. George Gazette* on 7th September, 1955, were made to take effect from the beginning of the current financial year, that is, from 1st April, 1955, thus giving them a retrospective operation. Doubts were evidently felt in regard to the validity of such a retrospective provision. Section 9 was enacted for removing all doubts in regard to that matter. In *Guruviah Naidu* v. *State of Madras*[1], a Division Bench of this Court held that, by reason of section 9 of Act I of 1957, the Rules were validly enacted to enable an assessment to be made on dealers for the year 1955-1956.

1. (1958) I M.L.J. 132 : (1958) 9 S.T.C. 145.

But the contention of the learned Advocate-General was that section 9 would have a more extended operation than that for which it was intended. Reliance was placed on the words of the section and that the Rules should " be deemed to have been made as if those Rules, as amended, were in force at all relevant times". The use of the words " at all relevant times " is relied on as indicating that the provisions of the section were to have a wider operation than for the year 1955-1956. Reference was made in this connection to the decision in *E. H. Battat* v. *The King*[1]. In that case a person was convicted of an offence against Singapore Finance Regulations. The Finance Regulations were expressed to have been made under the authority of the Military Administration Proclamation of 1945 made by the Supreme Allied Commander, South East Asia. The proclamation was validated and continued in force by section 5 of the Indemnity and Validating Ordinance of 1946 enacted by the Governor, which provided that all laws, proclamations, orders, rules, regulations and legislatives Acts whatsoever made or issued during the war period by or with the assent of any British or Allied Military Authority shall be deemed to have been validly made form the date of promulgation. The Privy Council, without deciding whether the Military Administration Proclamation of 1945, was valid or not in origin, held that the provision in section 5 of the Ordinance of 1946 gave validity to that which might otherwise have been illegal, and that, therefore, the criminal proceedings against the appellant had been properly initiated. Dealing with the contention that section 5 of the Ordinance validated only those promulgations which were invalid and not those which weie valid, the Privy Council observed at page 530:

" The draftsman here is clearly envisaging the possibility of existing proclamations *de facto* in force being invalid in law and is intending to give them the force of law. The fact that he enumerates certain specified defects which might otherwise have rendered such instruments invalid does not, their Lordships think, limit the generality of the earlier words, which are sufficient to validate all the enumerated instruments provided they have in fact been made or issued in the period in question by or with the assent of the appropriate British or Allied Military Authority.

The whole purpose of this Ordinance, unlike the Order in Council, is to give validity to that which might otherwise have been illegal and to afford protection to those whose acts might otherwise have made them liable to process of law. Such being its purpose it requires, if need be, to be given a liberal interpretation so as to achieve that which its language shows to have been made its object."

In the case before the Privy Council, though the object with which the validating Ordinance was passed was limited, the words of the Ordinance were sufficient generally to include all the enumerated instruments. But, in the present case, there are no such general words in section 9 which would warrant the extention of validation effected by the section to assessments other than for the year 1955-56. The words "at all relevant times " are used with respect to the assessment of the year 1955-56 and they cannot be taken as conferring validity of the rules beyond the period for which the section expressly provides. The decision of the Privy Council in *E. H. Battat* v. *The King*[1], was considered in detail by Rajagopala Ayyangar, J., in W.P. Nos. 14, etc., of 1958, who held that section 9 of Act I of 1957 would not have larger effect than validating the assessment for the year 1955-1956. We agree with the learned Judge in his conclusion.

The learned Advocate-General next invoked support for the validity of the Rule from section 7 of the Madras General Clauses Act. It was urged that any defect in the publication of the Rule would be cured by the final publication under section 19 (5) of the Act, which admittedly had been made in regard to the impugned Rule. Section 7 of the Madras General Clauses Act, enacts :—

" Where, by an Act to which this chapter applies, a power to make Rules is expressed to be given subject to the conditions of the Rules being made after previous publication the following provisions shall apply namely :

" (*a*) the authority having the power to make the rules shall, before making them, publish a draft of the proposed Rules,

(*b*) the publication shall be made in such manner as that authority deems to be sufficient, or if the condition with respect to previous publication so requires, in such manner as the Central Government or, as the case may be, the Provincial Government prescribes ;

1. L.R. (1951) A.C. 519.

(c) there shall be published with the draft notice specifying a date at or after which the draft will be taken into consideration ;

(d) the authority having power to make the rules, and where the Rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified ;

(e) the publication in the Official Gazette of a Rule purporting to have been made in exercise of a power to make Rules after previous publication, shall be conclusive proof that the Rule has been duly made."

It has therefore to be seen whether the provisions of section 7 (e) would validate non-compliance with the mandatory provisions as to publication like the one contained in section 19 (4) of the Act. For the application of section 7 (e) of the Madras General Clauses Act the following conditions have to be satisfied: (1) The enactment granting a power to make Rules should be one of those coming under Chapter IV of that Act. (2) The power to make Rules should be expressed to be conferred subject to their previous publication. (3) The Rules should be purported to have been made in exercise of the powers granted. (4) There should be a final publication in the official Gazette. If the above conditions are satisfied, the final publication in the official Gazette of the Rules is to be taken as conclusive proof that the Rules have been duly made. There is no controversy that the 1st and 4th requirements have been satisfied in that the Madras General Sales Tax Act is one coming under Chapter IV of the General Clauses Act and that there has been a final publication of the Rules under section 19 (5) of the Act.

It would be convenient, before considering the rival contentions in regard to the second requirement, to consider whether the third requirement has been satisfied. G.O. No. 2733 (Rev.), dated 3rd September, 1955, states that the Rules were made

" in exercise of the powers conferred by sections 3 and 5 of the Madras General Sales Tax Act 1939 and of all other powers"

which enable the Government to make amendments to the Madras General Sales Tax Turnover and Assessment Rules. Section 19 has not been specifically mentioned in the notification. The preamble to the notification stated "of all other powers hereunto enabling". Those words are wide enough to include the power to frame Rules granted under section 19. That apart, as in our opinion, it is section 19 that confers the power on the Government to make the Rules, it should be held that they acted under that provision as well. It follows, therefore, that in making the impugned Rules the Government purported to act in the exercise of their power under the Sales Tax Act. In the Shorter Oxford English Dictionary the word 'purport' is defined as

"(1) in the substantive form : as import, effect, sense, outward bearing or that which is intended to be done or effected by something, object, purpose, intention, (2) as a verb : to have as its purport, to convey to the mind, to mean, to imply, to profess or claim by its tenor ".

There can be no doubt, therefore, that in making the Rules the Government did purport to act under the powers given to it under the Act.

What there remains to be seen is whether the second of the four requirements stated above have been satisfied.

Mr. M. K. Nambiar, learned counsel for the assessees, contended that (1) section 7 of the Madras General Clauses Act would not, in terms, apply to the Rules made under section 19 of the Act, and (2) even if section 7 were held to apply, section 7 (e) would relate only to those infractions of the rule which were set out in section 7 (a) to (d) and not to the mandatory provisions like the one under section 19 (4). Taking up the first portion of this contention, the learned counsel submitted that a statute delegating the power of making Rules to a subordinate authority might be divided into three groups: (1) those which prescribe that the Rules should come into effect on publication ; an instance in point being section 38 (3) of Madras Act IX 1949 (Aliyasanthana Act) which states that all the Rules made under the section shall be published in the Gazette and on such publication shall have the effect as if enacted

in the Act, (2) those that prescribe that the Rule should be published with no other limitation, an instance of that kind being section 18 (4) of Act XX of 1933 (The Madras Commercial Crops Markets Act, 1933) which stated that the power to make Rules under the section was subject to the condition of the Rules being made after the previous publication, and (3) those which prescribed that there should be a pre-publication of the Rules for a particular period, an instance being found in sections 128 and 130 of the Madras Public Health Act (III of 1939).

The learned counsel contended that section 7 of the General Clauses Act would apply only to categories 1 and 2 set out above, and not to those Rules coming under the 3rd category in respect of which there exist a statutory mandate fixing a minimum period of pre-publication. We are however unable to find any warrant for any such distinction on the terms of section 7 of the Madras General Clauses Act. Section 7 applies to all cases of an enactment coming within Chapter 4, where a power to make Rules is expressed as subject to the condition of the Rule being made after previous publication. The words are of general import, and will include not only a case of Rules which have to be promulgated after previous publication, but also those which have to be promulgated after the minimum period of previous publication. The alternative line of argument was that, even assuming that the Rules to be framed under the Act would be governed by the provisions of section 7 (*e*) of the Madras General Clauses Act, section 7 (*e*) of the latter enactment would cure only those infractions that would come under clauses (*a*) to (*d*) of that section, but not the non-compliance with an independent and mandatory provision like the one in section 19 (4) of the Act.

The provision of section 19 (4) relates to the publication of the draft Rules at the first stage. Section 7 (*e*) of the General Clauses Act specifically provides for the case of such publication, and, therefore, section 19 (4) would be covered by the publication directed by that section. In a case where there is no prescription of a minimum period notice by a statute, the concerned rule making authority will have to fix a reasonable date for taking the draft Rules into consideration. But where a statute fixes a minimum period of notice, the notice under clause (*c*) of section 7 will fix the date in conformity with the statutory prescription. Therefore, section 7 (*c*) would include both the cases, namely, where a statute fixes no minimum period of notice and one which does. Therefore, if there is no publication of a notice under section 19 (4) of the Act, it would be an infraction of section 7 (*c*) of the General Clauses Act, and section 7 (*e*) would apply to it. In *Rangaswami Chettiar & Co.* v. *Government of Madras*[1], it was pointed out that section 7 (*e*) was designed to put an end to all controversy as regards the formalities prescribed by the preceding sub-section

The question was considered in the judgment of the Andhra High Court in *Sreeramulu Chetty* v. *State of Andhra*[2]. In that case there was no publication under section 19 (4) of the amendment to rule 13 of the Turnover and Assessment Rules under the Act. The Full Bench observed that the condition relating to the previous publication not having been complied with, the power conferred on the Government to make or amend Rules could not be deemed to have been exercised. The matter was further elucidated by the Division Bench, after receiving the opinion of the Full Bench Subba Rao, C.J. (as he then was) observed that, in order to apply the provisions of section 7 (*e*), the Rule should have been made purporting to be in the exercise of a power, and that the word 'purporting' indicated that the Rule would get sanctity, though not made in the actual exercise of the power but under a *bona fide* belief that it was made in the exercise of that power. The learned Chief Justice further observed:

"But what is necessary is that the Rule should be made under a purported or actual exercise of power which is defined in the sub-section. The power is defined as one to make Rules after publication. The power is conditional one. Unless that condition, namely, pre-publication in the prescribed manner, has been complied with, there cannot be an exercise of that power whether actual or purported. Till the condition is satisfied, the power does not exist, and, therefore, a rule cannot be made in exercise of that non-existent power. To state differently the power to make rules under section 19 of the Act can be exercised only after the condition of publication is fulfilled, and if a rule

1. (1957) 8 S.T.C. 222-234.
2. (1958) 1 An.W.R. 268 : 9 S.T.C. 215 (F.B.).

is made purporting to be in exercise of that power, it is conclusive under the Rule. We, therefore, hold that, if there was no publication in the manner prescribed by section 19 (4) of the Act, there was no power in the Government to make the Rule and, therefore, the validity of a Rule made in exercise of that non-existent power could be questioned ".

The question of purported exercise of power will arise only where it has not actually been properly exercised. With great respect to the learned Chief Justice, we are of opinion that the question is not so much as to whether there has been a non-compliance with the provision of section 19 (4), but whether it is permissible for the Court to investigate whether a rule has been duly made having regard to the provisions of section 7 (*e*) of the General Clauses Act. Section 19 (4) is no doubt mandatory in form, though generally provisions relative to the time for publication, manner and details, etc., would be directory. But section 7 (*e*) states that the final publication in the Official Gazette would be conclusive proof of the Rules having been duly made. The term 'conclusive proof' is defined in section 4 of the Evidence Act thus :—

" When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it ".

Therefore, on the terms of section 7 (*e*), it would not be competent for the Court to embark on enquiry as to whether there has been proper compliance with the Rules. In Craies on Statute Law, 5th Edition, at page 273, in considering the validity of subordinate legislation, the learned author observes :—

" The Courts therefore (1) will require due proof that the rules have been made and promulgated in accordance with the statutory authority, unless the statute directs them to be judicially noticed ; (2) in the absence of express statutory provision in the contrary, may inquire whether the rule making power has been exercised in accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any attached to the regulation ".

In our opinion, section 7 (*e*) provides a statutory direction to accept the final publication under section 19 (5) as conclusive proof. It is no doubt true that section 19 (4) was one enacted in the interests of the public to enable a person who will be affected by the Rule to put forward his case before the rule making authority before the final promulgation. At the same time, there is an equally weighty consideration that the defects in the promulgation of the Rules, like want of pre-publication, etc., should not be held to invalidate them (probably years afterwards) so as to render illegal all assessments which might have been made under the Rules. Section 7 (*e*) was, as pointed out in *Rangaswami Chettiar* v. *Government of Madras*[1], intended to achieve that purpose. In his judgment in W.P. Nos. 14, etc., of 1958, Rajagopala Ayyangar, J., held that section 7 (*e*) would not apply

" Where the Gvernment admitted that they proceeded on the basis that for a Rule to be made under section 3 (4) of the Act the only formality to be complied with was to have the resolution approved by the Legislative Assembly, and that they did not consider it essential to conform to the requirement of section 19 (4) ".

That concession, which was made in the case, is not made in the case before us. But even so, we are of opinion, that the operation of section 7 (*e*) would be irrespective of any later concession by the Government. An extreme illustration was put before us in the course of arguments. It was contended that if the Government had stated in the notification itself what they admitted now, (*i.e.*, of not having made the publication under section 19 (4) deliberately) it would be a travesty of section 7 (*e*) to say that the Rule was duly framed. We cannot see how that illustration would help the assessee ; that would be a plain case where the Government could not be said to have " purported " to act under the Act. Where there is no such defect in the notification we are of opinion that an admission of the Government that there was no publication under section 19 (4) would not entitle a Court to go behind section 7 (*e*) and accept such an admission as proof. We are of opinion that, notwithstanding the fact that there has been failure of the Government to comply with the conditions of section 19 (4) in promulgating the impugned rule, it would not be open to a Court to go into that question, having regard to the provisions of section 7 (*e*) of the General Clauses Act.

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1. (1957) 8 S.T.C. 222.

The other contentions urged on behalf of the State will have next to be referred to. The first was that, whatever might be our decision on the validity of rule 16, section 9 of Act I of 1957 would validate at least the assessment for the year 1955-1956. This contention is obviously unassailable.

The next contention was that, as clause 9 of G. O. No. 2733 stated "For rule 16, the following rule shall be substituted, namely, 16 (1), etc.," if the new Rules promulgated under the G.O. were held invalid, the old one should be held to be in existence and the assessment on the various assessees should be held to be proper. In our opinion, that contention is correct. Mr. M. K. Nambiar contended that, as the issue of notice and assessments were made after promulgation of the rules in 1955, it should be held that they were made only under the new Rules and therefore invalid, and that it would not be open to the Department to fall back upon the original Rules.

If the impugned rule 16, which only replaces the old rule 16, is held to be invalid, it would only mean that the substitute would be invalid; the original will remain. In our opinion, the assessment or notice issued could be justified on the basis of the old Rules, even if the new Rules were held to be invalid. It is not disputed that the petitioners would be liable to be assessed under the old Rules and the new Rules are substantially identical with those of the old Rules. We are, therefore, of opinion that the new Rules are valid.

W.A. No. 40 of 1958 related to the provisional assessment for the year 1956-1957. The appellant did not take objection to the Rule on the ground of want of publication before Rajagopala Ayyangar, J. But, in view of the fact that the appellant has taken a ground of objection regarding the non-compliance of section 19 (4) in the memorandum of grounds, and as the appeal was heard along with other petitions we have allowed him to raise the objection. T.C.No. 135 of 1959 relates to the assessment for the year 1956-1957. Both the Appeal and the Tax Case have got to be dismissed, in view of our finding that validity of the Rule could not be impugned by reason of section 7 (*e*) of the Madras General Clauses Act. W.P. Nos. 400 of 1957 and 282 of 1957 relate to assessment for the years 1955-1956. Independent of the question of the validity of the Rules by reason of section 7 (*e*) of the Madras General Clauses Act, the assessment in these cases would be validated by section 9 of Act I of 1957. Rules *nisi* would be discharged. The result is that W.A. No. 40 of 1958, W.P. Nos. 400 and 282 of 1957 fail, and are dismissed.

The respondents will pay the costs of the appellant in W.A. No. 40 of 1958. The respondent will be entitled to his costs in W.P. No. 400 of 1957. Court-fee Rs. 250 in each case. No order as to costs in W.P. No. 282 of 1957.

T.C. No. 135 of 1959 will be disposed of separately.

V.S. ——— *Appeal and petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM, MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

K.R.P.L. Chockalingam Chettiar .. *Petitioner.**

Extradition Act (XV of 1903), Chapter III—Rendition of person accused of an offence to the Ceylon Government under—Legality—Constitution of India, 1950—Article 19 (1) (d) and (e)—Fundamental rights—If infringed.

The Indian Extradition Act (XV of 1903) and Chapter III thereof, survive and are part of the law of this country, as saved by the effect of Article 372 of the Indian Constitution. Since in the present case, the procedure relevant to the Fugitive Offenders Act does not apply having been struck

* Crl.R.C. No. 1163 of 1959. 16th March, 1960.
(Crl.R.P. No. 1138 of 1959.) (26th Phalguna, 1881, Saka)

down by the Supreme Court as void and not in force after the attainment of independence, the case must fall within the wider ambit of Chapter III itself and be governed by the provisions of section 7 or 9 of the Chapter as the case may be. The rendition of the petitioners to the Ceylon Government under Chapter III after compliance with the necessary procedure and formalities would therefore be perfectly proper and in accordance with the law.

The scheme of the Act also indicates that Chapter III constitutes the genus of 'Non-Foreign States' of which the Dominions (Chapter IV) form a species and Chapter II deals with 'Foreign States' defined technically.

It cannot be said that all the provisions in the Act are connected in subject-matter dependent on each other and operating together for the same purpose or essentially and inseparably connected in substance so that when the unconstitutional portion is struck down that which remained is incomplete and in itself incapable of being executed. The validity of Chapter III cannot be affected on this score.

Since extradition is a subject specifically provided for as the object of legislation under the Constitution, it follows that the rendition of offenders for extraditable offences cannot be in derogation of the fundamental rights of freedom of movement or residence and that the restriction is " in the interest of the general public " under Article 19 (5) of the Constitution.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Collector and Additional District Magistrate, Ramanathapuram at Madurai, dated 30th September, 1959 and made in M.C. No. 1 of 1959.

T. M. Kasthuri and *T. A. Srinivasan*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

When the revision petition came on for hearing before him the following order of reference was made by

Somasundaram, J.—This is a revision against an order passed by the Collector and Additional District Magistrate of Ramanathapuram at Madurai on a letter from the Home Department, Madras, to the Additional District Magistrate, Madurai, which letter in turn was necessitated by a communication from the Ministry of External Affairs, Government of India, for the extradition of the petitioner herein, against whom a complaint was laid before the Chief Magistrate, Colombo, in C.C. No. 28703/A on his file for the offence of criminal breach of trust. Under the Memorandum, the Additional District Magistrate was to make an enquiry under section 3 of the Indian Extradition Act. The communication from the Ministry of External Affairs, New Delhi, was one under section 9 of the Indian Extradition Act. The Additional District Magistrate, after making an enquiry, has held that a *prima facie* case has been made out and has committed the petitioner to prison to await the orders of the Central Government under section 3 (4) of the Indian Extradition Act.

Mr. Kasturi, appearing for the petitioner, contends that the order passed by the Additional District Magistrate is wholly without jurisdiction and that as the law stands at present, the petitioner cannot be extradited to Ceylon. His main contention, is that none of the provisions of the Indian Extradition Act of 1903, that is, neither Chapter II, nor Chapter III, nor Chapter IV will apply to the facts of the case.

The Indian Extradition Act was passed before the attainment of Independence of India when India was a British possession. At the time when this Act was passed there were two Acts passed by the Parliament in England; they were the Extradition Acts of 1870 and 1873 and the Fugitive Offenders Act of 1881. The Extradition Acts, 1870 and 1873, applied only to cases of those foreign States with whom England had entered into treaty for the rendition of criminals. The Fugitive Offenders Act was passed for the British Colonies and Dominions, including British possessions in India. The procedure to be followed before surrendering criminals in the case of Foreign States is different from the procedure to be followed in the case of Colonies and British possessions. Apart from the Foreign States and the British Colonies and possession there was another set of States which did not fall under either of the above categories. There were the Native States in India. Native States were neither Foreign States for England nor were they Colonies within the British Empire. The Extradi-

tion Acts of 1870 and 1873 and the Fugitive Offenders Act, 1881, will not therefore apply to them. It is in this context that the Indian Extradition Act was passed including therein another provision contained in Chapter III. Chapter II applied to those States to which the Extradition Act of 1870 and 1873 will apply. The Fourth Chapter will apply to the Dominions to which the Fugitive Offenders Act will apply. As there is now a third set of States to which neither of the two Chapters will apply, *i.e.*, the Indian States, Chapter III was included. That is why it is stated there that the Chapter will apply to States not being a Foreign State. Now, after the attainment of independence the provisions of the Fugitive Offenders Act which related to the group of British Dominions have been held to be inapplicable as India does not form part of that group. If the Fugitive Offenders Act does not apply, then we are left with the two Chapters, Chapters II and III. Chapter II, as already stated, will apply only to Foreign States with which England has entered into treaty. Chapter II therefore will not apply to Ceylon as it was a Dominion; and Chapter III, as already stated, will apply only to those States which are not Foreign States. Now, so far as India is concerned, Ceylon neither forms part of the group of States to which the Fugitive Offenders Act will apply, nor can it be said that Chapter II will apply because, England has not entered into treaty with Ceylon. But, Ceylon is a Foreign State so far as India is concerned, Chapter III, will not, therefore be applicable to extraditions applied for from Ceylon. But in Ceylon the Fugitive Offenders Act has been amended, so as to include India; but, there is no such enactment so far as India is concerned, and, as the law stands at present, it looks as though the law does not permit rendition of a criminal on an application made by the State of Ceylon though Ceylon has, on its part, passed an enactment to render a criminal when applied for by India. The question is an important one and on account of the importance of the question, the learned Advocate-General suggests that the matter may be referred to a Full Bench.

I direct that the papers be placed before my Lord, the Chief Justice for orders as to posting before a Bench or a Full Bench.

The question to be decided is:

"Whether the extradition can legally be made under section 7 or section 9 of the Indian Extradition Act, 1903, to any country to which section 19 of the Act and the Fugitive Offenders Act, 1881, was applicable."

When the case came on for hearing before a Full Bench consisting of (*Somasundaram, Ramaswami* and *Anantanarayanan, JJ.*, the Court expressed the following opinions.

Somasundaram, J.—I had the privilege of perusing the judgments of my learned Brethren Ramaswami and Ananthanarayanan, JJ. They have dealt with the point fully, ably and exhaustively that I do not think it necessary to add anything to it. I entirely agree with the opinion expressed by my learned Brethren.

The answer to the reference will be in the affirmative.

Ramaswami, J.—On a reference made by our learned brother Somasundaram, J., whether Chapter III of the Indian Extradition Act, 1903, continues to be applicable to this case of extradition from India to Ceylon, this Full Bench has been constituted by the learned Chief Justice.

The facts leading to this reference are: The petitioner Chockalingam Chettiar, a native of Kandavarayanpatti Village, Tiruppatur Taluk in Ramanathapuram District was employed as an agent of 'Chetty' by the Gonakelle, El Teb and Dammeria Estates. The practice is for the Superintendents of these Estates to draw cheques in favour of this Chockalingam Chettiar on the Imperial Bank of India and the Mercantile Bank of India at Colombo and Chockalingam Chettiar would cash those cheques and disburse the amounts to the labourers employed in the said Estates who apparently are mostly Tamilians. Three such cheques were issued by the respective Superintendents of these three Estates Messrs. Deaker, Percy and Horn for a total sum of Rs. 1,10,000. It is the case for these Estates that the said Chockalingam

Chettiar after cashing in the amounts dishonestly converted to his own use roughly Rs. 60,000 and decamped to his native place in India. Thereupon complaints have been given to the Colombo Police for an offence under section 392 of the Ceylon Penal Code (corresponding to section 409, Indian Penal Code) an extraditable offence and they have been investigated and a charge-sheet has been filed before the Chief Magistrate of Colombo. On account of this Chockalingam Chettiar having left for India, the Chief Magistrate, Colombo, recorded the evidence in his absence and has apparently reported the matter to the Government of Ceylon. The Government of Ceylon have sent a requisition to the Government of India for the extradition of this Chockalingam Chettiar. Thereupon, under instructions from the Ministry of External Affairs, Government of India, the Madras State Government, Home Department, in their Memo., dated 25th July, 1959, directed the Additional District Magistrate of Ramanathapuram to hold an enquiry and to report the result to the Government.

The accused Chockalingam Chettiar was apprehended by the issue of a warrant by Sri E.C.P. Prabhakar, I.A.S., and released on bail. The learned Magistrate supplied the accused with copies of all the documents on which the prosecution relied on 21st August, 1959. The accused at the next hearing was asked to explain the circumstances appearing against him as found in the requisition. The accused was represented by an advocate. On the examination of the accused being over, the Inspector of Police, Ceylon, who filed the charge-sheet before the Chief Magistrate of Ceylon was examined and cross-examined. The written statement of the accused was filed on 5th September, 1959 and both the parties closed their case.

The case for the accused was that for about 25 to 30 years he has been paying the salaries to the labourers and obtaining a commission from the management for the actual disbursements, that in December, 1954, his business failed, that he paid to the management whatever amount he had in the bank and came away to India as his wife was ill and that he did not go back because his visa had expired.

The learned Additional District Magistrate Sri Prabhakar found that from the evidence, both oral and documentary a *prima facie* case had been made out in support of the requisition and he committed the accused to prison awaiting the orders of the Central Government under the provisions of the Indian Extradition Act. A revision has been preferred by the accused Chockalingam Chettiar and on a reference made by our learned brother Somasundaram, J., before whom the Revision came in the first instance, the matter is coming up before this Full Bench.

I agree with the judgment of my learned brother Anantanarayanan, J., but on account of the importance of the subject I shall add the following :

Extradition, as defined in Halsbury's Laws of England, Third Edition, Volume 16 page 560, is the delivery on the part of one State to another of those whom it is desired to deal witn for crimes of which they have been accused or convicted and are justiciable in the Courts of the other State. In 25 Corpus Juris, page 254, extradition has been defined to be the surrender by one State or nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. Similarly in 22 American Jurisprudence, page 244, section 2. It, must be distinguished from transportation and from deportation, which also result in the removal of a person from the country.

The foundation of extradition, which is the delivery on the part of one State to another of those who have fled from justice, is founded on the principle that the reciprocal surrender of criminals is in the common interest of civilised communities : per Russell, L.C.J., *In re Arton*[1].

The early History of the practice of extradition in Roman Empire, England and France will be found set out in Sir Edward Clarke's Law of Extradition, Third edition Chapter, II, page 16 and following (1888).

1. L.R. (1896) 1 Q.B. 108.

The basis and extent of extradition differ in different countries. The law of England with regard to extradition depends entirely upon statute. A fugitive criminal found in the United Kingdom may be surrendered to a foreign State only in accordance with the provisions of the Extradition Acts, 1870 to 1935 by proceedings which are authorised and regulated by those Acts. The Extradition Acts did not apply in the case of any foreign State unless Her Majesty so directs by Order in Council. The Acts extend to the Channel Islands and the Isle of Man as if they were part of the United Kingdon, and when applied to a Foreign State, unless the Order in Council otherwise provides, extend, subject to certain modifications, to every British possession (*See* Halsbury's Laws of England), Third Edition, Volume 16, page 560.

The basis and extent of extradition in the United States of America is set out in 25 Corpus Juris, pages 273 to 275 (sections 52 and 53) as follows :

"There is no obligation upon a Government, under the law of nations, to surrender fugitive criminals to a foreign power, and the sovereign power upon which demand is made may exercise its discretion and may investigate the charge upon which the surrender, is demanded. In the United States it is well settled that independently of statutory or treaty provision, no authority exists in any branch of the government to surrender a fugitive criminal to a foreign government, although in 1864 Mr. Seward, Secretary of State of the United States, with the sanction of President Lincoln, directed the arrest of a fugitive from Cuba as a purely executive act in a case in which this country had no extradition treaty with the country from which the criminal had fled and there are text-writers and dicta in some cases which assert that it is the duty of one nation to surrender fugitive criminals upon the demand of another nation, especially in the case of the more heinous offenders as a matter of international comity in the absence of treaties.. It is the present doctrine in England and Canada that the extradition of a fugitive criminal cannot be granted in the absence of specific legal authority. As the United States does not surrender fugitive criminals in the absence of treaty stipulation, its practice is to decline to request extradition from a foreign Government with which this Government has no treaty providing for surrender, although there are isolated cases in which this Government has requested of foreign governments the surrender of fugitive criminals as an act of comity, but in these cases, the request has always been accompanied by the statement that under our law reciprocity cannot be granted. As no authority exists in any branch of this government to surrender a fugitive criminal in the absence of a treaty stipulation extradition can be granted, where a treaty exists, only for an offence enumerated in the treaty and this government will request extradition from a foreign Government only for an offence included in the treaty ; and the same rule of law has been laid down by the Canadian Courts, although there appears to be some authority for the doctrine that the existence of an extradition treaty between two countries does not prohibit the surrender by either Government of a person charged with a crime not enumerated in the treaty. Where a person charged with a crime not provided for by treaty is delivered to the authorities of the United States as an act of comity, such person is not entitled to be discharged on *habeas corpus* and none of his personal rights has been violated. It is within the power of Congress to provide by statute for the extradition of fugitives from the justice of a foreign country without regard to any reciprocal treaty obligation, and this power is not affected by the character of the criminal procedure of the foreign country or by the fact that the alleged offender is a citizen of the United States.

"International extradition in the United States is based on treaty stipulation. The United States has treaties of extradition with most governments. A treaty stipulation on the part of the Government of the United States to surrender fugitives from justice is a lawful stipulation, and within the authority of the treaty making power. The treaties of Great Britain with the United States have been extended to include the surrender of the fugitive offenders between the State of North Borneo and the Philippine Islands or Guam." (See also 22 American Jurisprudence, page 244—Basis of Right of Extradition.)

There is an interesting study of Extradition on the Soviet Union and Eastern Europe in the recent two-volume publication "Government, Law and Courts in the Soviet Union and Eastern Europe" published by Stevens & Sons, Limited, London, and edited by Vladimir Gsovski and Kazimierz Grzybowski (1959). The provision in the Soviet Law dealing with extradition is Para. 2 of section 16, "Basic Principles of Criminal Procedure of the Union and the Soviet Republics." It reads :—

"SECTION 16 (para. 3).—The extradition of persons against whom the investigation is pending or who are committed for trial or convicted by judicial bodies and whose extradition is requested by a foreign government from the Government of the U.S.S.R. shall be permitted only in cases and in the manner established by the treaties, agreements and conventions of the U.S.S.R. with foreign Governments, or by a special agreement of the Government of the U.S.S.R. with foreign Governments, as well as by a special law, enacted in the form of federal legislation."

The Soviet Union has entered into treaties with their associate States of Eastern Europe from 1957.

Closely akin to, though not in strictness part of the law of extradition, is the question of the surrender of fugitive offenders between different possessions of the former British Empire.

Prior to the Extradition Act, 1870, (33 and 34 Vict. Ch. 52) there was no general Statute giving legal validity to extradition treaties concluded with Foreign States by His Majesty the King, and a separate Act had to be passed on the occasion of each new treaty. This Statute, as subsequently amended—it was the subject-matter of a review by Royal Commission appointed in 1877 consisting of eminent jurists like Cockburn, Seiborne, Esher, etc., has been the foundation of the law of extradition for the whole British Empire, except in the case of Canada where by Order in Council, dated 6th July, 1907, issued under section 18 of the Act, the operation thereof in Canada was suspended so long as Part I of Chapter 155 of the Revised Statutes of Canada 1906, and (now the Revised Statutes of Canada, 1952, c. 322) continues in force.

The Extradition Acts of 1870 to 1935 did not apply in the case of any foreign State unless Her Majesty so directs by Order in Council. The Acts extend to the Channel Islands and the Isle of Man as if they were part of the United Kingdom, and when applied to a Foreign State unless the Order in Council otherwise provides, extend, subject to certian modifications, to every British possession. Where an arrangement has been made with any Foreign State with respect to the surrender to that State of any fugitive criminals, the Order in Council applying the Extradition Acts to that State or any subsequent Order, may be limited in operation and may be restricted to fugitive criminals who are in, or suspected of being in, the part of Her Majesty's Dominions specified in the Order and its operation may be subject to conditions, exceptions, and qualifications. The Order must recite or embody the terms of the arrangement and will not remain in force for a longer period than the arrangement. Every Order must be laid before Parliament and must be duly published.

The application of the Act of 1870 to British possessions outside the United Kingdom has been provided for by section 17, while section 18 provides for the saving of laws of British possessions, which was amended in relation to India by the Government of India Adaptation of Acts of Parliament Order, 1937 S.R. & O. 1937 No. 230, Article 2 and Schedule Part II, see now the Indian Independence Act, 1947 (10 and 11 Geo. VI, C. 30, section 18 (1) (2), Halsbury Third Edition, Vol. 5, page 68). By an Order in Council, dated the 7th March, 1904, published in the Manual of Procedure Relating To Extradition, corrected up to 1st December, 1940, Third Edition (Published by Authority, at page 86, it was declared that Chapter II of the Indian Extradition Act will have effect in British India as if it were part of the Extradition Act, 1870: *Vide* section 18 of that Act). This Chapter was intended to substitute the Indian Procedure for that contained in sections 7 to 12 of the Extradition Act, 1870.

Section 23 of the Extradition Act, 1870, printed at page 52 of the Manual (*ibid*) runs as follows :—

> "Nothing in this Act shall affect the lawful powers of Her Majesty or of the Governor-General of India*a* (or, as the case may be, of the Governor of Burma)*b* to make treaties for the extradition of criminals with Indian Native States, or with other Asiatic States coterminous with British India, (or with Burma)*a* or to carry into execution the provisions of any such treaties made either before or after the passing of this Act."

Section 25 states :

> "For the purposes of this Act, every colony, dependency and constituent part of a foreign State, and every vessel of that State, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign State."

To recapitulate the application of the Extradition Acts of the United Kingdom to British possessions, in the language of Halsbury

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a. Inserted by the Adaptations Order.
b. The words " in Council " repealed by the Adaptation Order.

"When the Extradition Acts are applied by Order in Council under any treaty, unless by such order it is otherwise provided, they extend to every British possession[1] but with certain necessary modifications in procedure[2] which are stated subsequently. This, however, is subject to a saving for the laws of British possession under which the operation of the Extradition Act, 1870, may be suspended, or the law of the British possession may be given effect as part of the Act. Moreover, no Act of the United Kingdom Parliament passed since the Statute of Westminister, 1931, extends to a dominion[3] as part of the law of that dominion unless it was expressly declared in the Act that the dominion had requested and consented to the enactment thereof.[4]

But if by law or ordinance of the legislature of any British possession, provision is made for the surrender of fugitive criminals to foreign countries, the operation of the Extradition Acts may be suspended[5] by Order in Council or the law or ordinance may be directed to have effect as if it were part of the Extradition Act.[6]"

(1) By section 26 the term British possession means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and the Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature are deemed to be one British possession. Until the federal legislature by law provides otherwise, the Extradition Acts, 1870 to 1935, have effect in relation to the Federation of Rhodesia and Nyasaland as if there were no federal legislature for these territories: see the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, S.I. 1953 No. 199, Section 13 (1).

(2) The Republic of Ireland (formerly the Irish Free State) is no longer part of Her Majesty's dominions (Ireland Act, 1949 (12, 13 and 14, Geo. 6, c. 41), S. 1 (1), but until the United Kingdom Parliament or some other competent authority, provides to the contrary, any enactment made before 2nd June, 1949, in so far as it operates as part of the law of any part of the United Kingdom, or colony, protectorate or trust territory of the United Kingdom, is construed so that references in the enactments to the territory which is or includes the Republic of Ireland shall continue to refer to it or so as to include it; section 3 (2) (*a*).

(3) This means Australia, Canada (including Newfoundland) Ceylon, India, New Zealand, Pakistan and the Union of South Africa.

(4) Statute of Westminister, 1931 (22 and 23 Geo. 5, c. 4) s. 4. The provisions of that section have been followed in recent orders in Council applying the Extradition Acts to foreign States and separate orders in Council have been made applying the Acts, as regards the dominions to the foreign states. Orders in Council mentioned above as relating to India relate also to Pakistan); see the Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30), s. 18 (1) India and Pakistan have become Republics while remaining members of the Commonwealth, but until provision to the contrary is made by the authority having power to alter the law all existing law has the same operation in India and Pakistan as if they had not become Republics: see the India (Consequential Provisions) Act, 1949 (12, 13 Geo. 6, c. 92), s. 1 (1), and the Pakistan (Consequential Provision) Act, 1956 (4 & 5 Eliz, 2. c, 31), s. 1 (1).

(5) The operation of the Extradition Acts has been suspended in Canada so long as Part I of Chap. 155 of the Revised Statutes of Canada (now the Extradition Act, Revised Statutes of Canada, 1952, c. 322) continues in force (Order in Council dated 6th July, 1907, S. R. & O. 1907 No. 546). By proclamation dated 28th May, 1952 made under section 18 (2) of the British North American Act, 1949, (12, 13 & 14 Geo. 6, c. 22) and published in the Canada Gazette, 1952, Part II, p. 502, the Canadian Extradition Act applied to Newfoundland.

(6) Ceylon (Order in Council dated 4th February, 1878; India (Consequential Provisions) Act, 1949, Pakistan (Order in Council dated 21st November, 1895, S.R. & O. 1895 No. 568, 7th March, 1904. S.R. & O., 1904 No. 317, Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30) s. 18.

The question of the surrender of the fugitive offenders between the various possessions of the British Empire was also subject to Imperial Statute, *viz.*, the Fugitive Offenders Act, 1881, 44 and 45 Vict. C. 69 and as in the case of the Extradition Act, 1870, provision has been made by section 32 thereof for the recognition of Acts of the legislatures of British possessions providing for the application and carrying into effect within those possessions of the Act in question. In the case of British India, this power has been exercised by the Order in Council, dated the 7th March, 1904, recognising Chapter IV of the Indian Extradition Act, 1903, and declaring that it should be given effect to through out His Majesty's dominions and on the high seas, as if it were part of the Fugitive Offenders Act, 1881.

Part I of the Act provides the procedure similar to that under the Extradition Act, 1870, while Part II provides a more rapid procedure within the groups of British possessions to which that part has been applied by Order in Council. In regard to the application to British dominions, Halsbury has the following to say, (Vol. 16, page 383.)

"For the purpose of the Act the United Kingdom, the Channel Islands, and the Isle of Man form one part of Her Majesty's dominions; and a British possession is any part of Her Majesty's dominions,

exclusive of the United Kingdom, the Channel Islands and the Isle of Man. All territories and places within Her Majesty's dominions which are under one legislature are deemed to be one British possession and one part of Her Majesty's dominion.[7] The Act remains in force as part of the law of the Republic of Ireland."

(7) Fugitive Offenders Act, 1881. The Act remains in force as between the United Kingdom and the Republic of India (Re. Government of India and Mubarak Ali Ahmed., (1952) 1 All E.R. 1060 applying the India (Consequential Provision) Act, 1949 (12, 13 & 14, Geo. 6, c. 92).

The Indian Legislature enacted the Indian Extradition Act of 1903. Its history falls into three parts (1) 1903 to 1947; (2) 1947-1950; (3) 1950 upto date. I shall follow this division in examining its provisions.

The English Extradition Acts have been justly praised. Piggott (C.J. Hongkong) in his "Extradition" preface remarks:

"The Extradition Act stands, I think as a monument of successful draftsmanship, it has so established itself that almost one has come to believe it could take rank as a doctrine inherent to scientific law-making. The successful statute makes little fuss, causes little arguments in the Courts. And judged by the standard (the brevity of the case-law arising under it), this statute must be pronounced to be very successful."

Part one.—The Indian Legislature in enacting the Indian Extradition Act, 1903, has, in addition to the modifications of these Imperial Statutes in their application to British India in a manner necessary to adapt them to the circumstances of this country, also provided for cases not covered by the Imperial Statutes. It will be convenient to summarise the provisions of this Act, which is made up of provisions which fall into several classes.

(1) The provisions of Chapter II which are part of the Extradition Act, 1870, and deal with the surrender of fugitive criminals to Foreign States to which that Statute applies.

(2) The provisions of Chapter III which deals with the surrender of fugitive criminals to States other than those to which that Statute applies.

(3) The provisions of Chapter IV which deals with the application of the Fugitive Offenders Act, 1881, to British India and are strictly not part of the law of extradition proper at all.

(4) The provisions of Chapter VI which provide for the execution of commission issued by criminal Courts outside British India which is also a subject outside the strict scope of the law of extradition.

In applying the provisions of Chapter II of the Indian Extradition Act, 1903, therefore, the fact must always be borne in mind that these provisions are part of the general extradition law of the (former) Empire. As has been pointed out above, the provisions of Chapter III only apply to those States to which the Extradition Acts of 1870 and 1873 do not apply, that is, to those States in respect of which His Majesty in Council has not made an Order in Council under section 2 of the Extradition Act, 1870. The provisions, therefore, of that Chapter constitute express statutory provision applying to British India only for the extradition of criminals in cases not provided for by the general extradition law of the (former) Empire.

It may be convenient here to exhibit in tabular form as: Muddiman has done in his Law of Extradition (1914 Edition), a general conspectus of the law regarding the rendition of offenders from British India.

Rendition of Fugitive Offenders.

1. *States outside the Empire.*	*Law applicable.*
(*a*) to States where the Extradition Statutes apply.	The Extradition Act, 1870 and Chapter II of the Indian Extradition Act, 1903.
(*b*) to States where they do not apply.	The Indian Extradition Act, 1903, Chapter III.
2. *British possession:*	The Fugitive Offenders Act, 1881, and Chapter IV of the Indian Extradition Act, 1903.

Certain sections of the Indian Extradition Act may now fitly engage our attention. That examination will show that this Act is not an arbitrary or capricious imperialistic piece of legislation but is on the other hand the careful product of a striving between what is due by way of reciprocal international courtesy to achieve the common objective of suppression of crime and what is due by way of protection of one's own citizens before being delivered up for trial in a foreign country whose laws they were accused of having broken. The Act while maintaining the rights of the individual as far as possible, does not overlook the rights which the public and the State are entitled to claim. Thus the Extradition Act is a harmonious combination of what is agreeable to our Constitution and laws and the voluntary exercise of the power to surrender a fugitive from justice to the country from which he has fled and which it has been said "it is under a moral duty to do so". (22 Am. Jurist, page 245) citing *Factor* v. *Laubenheimer*[1].

The objects of the Indian Extradition Act are stated as follow:—

(*a*) to provide for the more convenient administration of the Extradition Acts, 1870 and 1873, and of the Fugitive Offenders Act, 1881 (in British India, omitted by A.L.O. 1950).

(*b*) to amend the law relating to the extradition of criminals in cases to which the Extradition Acts, 1870 and 1873, do not apply.

In section 2 (*c*) "Foreign State" is defined as meaning "a State to which *for the time being*, the Extradition Acts, 1870 and 1873 apply". In other words, in course of time States included would get excluded from this category and States not included may get included in this category. The heading of Chapter II is "Foreign States" the heading of Chapter III is "Other than Foreign States", the heading of Chapter IV is "Dominions" and the heading of Chapter V is "At Sea". Section 2 (*b*) defines "extradition offence" as meaning "any such offence as is described in the First Schedule", and can be equated to section 26 of the English Act wherein it is stated that the term "extradition crime" means "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the First Schedule to this Act". Chapter II of the Indian Act, sections 3 to 6 deals with surrender of fugitive criminals in case of foreign States. But in regard to Chapter III, sections 7 to 18, surrender of fugitive criminals in case of States other than foreign States, the expression "extradition offence" is defined in section 2 (*b*) and Schedule I. Thus, between Chapter II and Chapter III, all possible permutations and combinations of the countries in the world are dealt with, provided that any demanding State must either be a "Foreign State" or "not a Foreign State".

Section 3 is the most important section and in reference to which several terms have to be carefully considered.

The "requisition" need not be in any particular form but it should be accompanied by some evidence that the person whose surrender is demanded is a fugitive criminal of the State making the demand. It may be made by a diplomatic representative of the State asking for the surrender or by any person recognized by the Government of India as the Consul-General, Consul or Vice-Consul or (if the fugitive criminal has escaped from a colony or dependency of the Foreign State on behalf of which the requisition is made) as the Governor of such colony or dependency.

"*A fugitive criminal of that State*" means a person accused or convicted of an extradition crime committed within the jurisdiction of that State, *c.f.*, section 26, Extradition Act, 1870.

In order to constitute an extradition crime defined in section 26 of the English Act, it is not essential that the fugitive should be a subject of the State which demands his extradition. Unless there are treaty arrangements to the contrary, a requisition by State B for the surrender of a subject of State A who committed a crime in State B and has fled to State C, is valid. It is not even necessary that the person

1. 290 U.S. 276 : 78 L.Ed. 315.

accused of an extradition crime should have been in the Foreign State at the time the crime was committed : *R.* v. *Ganz*[1].

Accessories equally with principals are liable to be surrendered : see section 3, Extradition Act, 1873.

"*May if it thinks fit*" : The words are permissive ; but if the law and the treaty provisions are complied with, it seems that the order would be as of course.

"*Issue an order*" : The only Government competent to issue the order for enquiry is the Government to which the Foreign State has made the requisition : Per Mookerjee, J., in *Rudolf Stallman*[2]

"*Such evidence as may be produced*" : It is the duty of the Magistrate to hear evidence on behalf of the fugitive criminal. If the Magistrate does not give the fugitive criminal an opportunity of defence this is not a mere irregularity but goes to the jurisdiction of the Magistrate. *Rudolf Stallman*[2], *Mansur Khachar* v. *Ram Khachar*[3].

"*A prima facie case*" : *c.f.* section 10 of the Act of 1870. Such evidence (subject to the special provisions of the Act) as in the case of a fugitive criminal accused of an extradition crime would justify his commitment for trial if the crime had been committed within the local limits of the Magistrate's jurisdiction.

Reference to High Court ; Provision is made for reference to the High Court where the report of the enquiring Magistrate or the written statement of the accused raises an important question of law. It cannot be regarded as a substitute for the right to apply for a writ of *habeas corpus* and on which topic see *D. M., Trivandrum* v. *K. C. Mamman Mappillai*[4].

In regard to the enquiry by the Magistrate two matters should be referred to, *viz.*, (1) pleas open to the arrested person and the judicial determination of the same and (2) Revision by the High Court. When an accused has been arrested and produced before the District Magistrate or the Chief Presidency Magistrate, as the case may be, such a Magistrate has to record any statement made by the accused. At this stage the accused may (1) point out to the Magistrate that the warrant does not, on its very face, fulfil the requirements of section 7; (2) allege that he is not person directed to be arrested, under the warrant; (3) point out that the warrant has not been executed according to law ; and (4) apply under section 8-A and pray that a report may be made to the Central Government for the cancellation of the warrant and that he may be released under the provisions of section 15. When the accused does so, the Magistrate is called upon to decide the points raised before him judicially and in the last three cases mentioned above may have to take evidence on oath. When he decides any of the points raised by the accused, it is a judicial order and as such open to revision by the High Court ; *H. K. Lodhi* v. *Shyam Lal*[5], as it is a valuable right of a citizen that he should not be sent out to a foreign jurisdiction without the law relating to extradition being strictly complied with. The decisions are uniform that a Court must give a strict interpretation to the provisions of the Extradition Act : *Ram Par Gas* v. *Emperor*[6], *Emperor* v. *Gulli*[7], *Santabir* v. *Emperor*[8].

The term "Political Agent" in section 7 has to be read with section 3 (40) of the General Clauses Act, and includes a principal officer representing the Government in any territory or place beyond the limits of British India and any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being

1. (1882) L.R. 9 B.D. 93.
2. (1911) I.L.R. 39 Cal. 164 at 167.
3. (1907) 4 Crl. L.J. 136.
4. (1939) 2 M.L.J. 135 : I.L.R. (1939) Mad. 708 : A.I.R. 1939 Mad. 120 (F.B.).
5. A.I.R. 1950 All. 100.
6. A.I.R. 1948 All. 129.
7. A.I.R. 1914 Cal. 22.
8. A.I.R. 1935 Cal. 122.

in force relating to foreign jurisdiction and extradition: *Hadibandhu Padhan* v. *Emperor*[1]. The Political Agent in all cases before issuing warrant has to satisfy himself by preliminary enquiry or otherwise that there is a *prima facie* case against accused: *C. P. Mathen* v. *D. M., Trivandrum*[2].

The enquiry to be held under section 9 has already been referred to when dealing with section 3. The Statement of Objects and Reasons states:

"*Clause* 9.—In order to meet the case of other than Foreign States we have by this clause applied to such States the provisions of clause 3 of our revised Bill, which were of general application in the Bill as introduced. The clause further makes it a condition that, where there is a Political Agent in or for any such State, the requisition for the surrender of the accused person must be made through the Agent". (*Select Committee's Report*).

When neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant under section 10. It is an essential ingredient of this procedure, that there should be a warrant. Under section 10 the jurisdiction is distinctly conferred on the Magistrates in British India to make preliminary enquiries and to take evidence on the information given or complaint laid in regard to the offence alleged to have been committed by the native Indian or British subjects of His Majesty within and beyond the limits of British India not being a foreign State as defined in the Act and to order warrant to issue for arrest of such accused persons.

Section 18 lays down:

"Nothing in the Chapter shall derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly."

Therefore, nothing in Chapter III of the Act shall derogate from the provisions of any treaty, that is, it incorporates in effect provisions of such treaty in the Municipal Courts of India. When therefore the treaty says that offenders shall be extradited on demand, it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure, initiated, prescribed and sanctioned by itself alone and not agreed upon by the contracting parties is satisfied: *Muthu Reddi* v. *Emperor*[3]. The Extradition Act is the law of land, not so far as the Third Chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by treaty, section 18 of the Act provides that it may be followed; but if the Government chooses to exercise the powers given by the Act, no Municipal Court can interfere on the ground that the Government had undertaken to act otherwise by treaty; *Moonga Lal* v. *Emperor*[4]. In other words, a Government or State is entitled if it so wishes to hand over persons subject to the law of another State, at the request of that State. All that the section provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations: *Jamna* v. *Emperor*[5], *Ram Babu Saksena* v. *State*[6].

The discussion of the provisions of the sections of the Indian Extradition Act can be completed by citing an extract from the Statement of Objects and Reasons:

"The present Bill is exclusively confined to the subject of extradition. The legislation required in this country has to make provision for the extradition of criminals in cases of two different kinds. The Government here may, in the first place, be asked by a friendly State to surrender a person in fulfilment of the obligations imposed by a treaty to which the Extradition Act, 1870 (33 & 34 Vict. c. 52) applies; and, where this is so, it seems expedient that the provisions of the English Statute and more especially those which are intended for the protection of accused persons—should be followed as closely as may be. In the second place, the surrender of an accused or convicted person may be sought by a Native State in India, or by a neighbouring Asiatic State, in pursuance of the terms of a

1. (1947) 48 Cr.L.J. 40.
2. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222: I.L.R. (1939) Mad. 744: A.I.R. 1939 P.C. 213.
3. A.I.R. 1930 Mad. 981.
4. A.I.R. 1933 Pat. 295 : I L.R. 12 Pat. 347.
5. A.I.R. 1926 Sind 126.
6. (1950) S.C.J. 406 : (1950) S.C.R. 573.

treaty or a friendly understanding to which the Government of India is a party ; and in such a case, it is desirable and sufficient that the procedure prescribed should be both simple and expeditious.. The distinction has been observed in the present Bill." (See the Statement of Objects and Reasons, *Gazette of India*, 1901 Part V, page 24, printed at page 1073 of the M.L.J. Criminal Court-Manual. Central Acts (Minor Acts) Vol. III and pages 4024-4025, Vol. 4, A.I.R. Manual (Civil and Criminal.)

Turning to the Fugitive Offenders Act, Halsbury has the following to say :

"The Courts in any part of Her Majesty's dominions have jurisdiction to cause the return of a fugitive offender to any other part of those dominions, including the United Kingdom, where he is accused of an offence to which Part I of the Fugitive Offenders Act, 1881, applies. A Judge of a superior Court or the Governor of a British possession may endorse the warrant, if satisfied that it was issued by the proper authority, for the apprehension of the fugitive, who may then be taken before a Magistrate. A Magistrate there may issue a provisional warrant of which he must send a certified copy, with a report of the case, to the Governor. The jurisdiction to hear a case and to commit a fugitive to prison to await his return is exercised in a British possession by any Judge, justice of the peace or other officer having the like jurisdiction as one of the metropolitan police magistrates at Bow Street, or by such other Court, Judge, or Magistrate as may be named for the purpose of local legislation. After the completion of Court proceedings, the Governor may, if he thinks it just, issue a warrant for the return of the fugitive, but if the fugitive has not left within a month a superior Court may, unless cause is shown to the contrary, order him to be discharged from custody.

Part I of the Fugitive Offenders Act, 1881, applies to treason, piracy and every other offence, however classified, which is for the time being punishable, where committed, by imprisonment with hard labour for twelve months or more or by any greater punishment. A superior Court has power to release a fugitive where the case appears trivial or his return would be unjust.

Part II of the Fugitive Offenders Act, 1881, provides that in groups of contiguous British possessions to which that part may be applied by Order in Council, a more rapid procedure for the return of fugitive offenders between possessions in the same group may be in force. The warrant is 'backed' in the possession in which the fugitive is found and he is sent for trial without any hearing in that possession.

There is power to extend the provisions of the Fugitive Offenders Act, 1881, by Order in Council to any place under the protection of Her Majesty and to any place where Her Majesty has jurisdiction, as if it were a British possession." (Halsbury's Laws of England, Third Edn., Vol. 5, pages 679-80.)

To sum up for extradition from British India, the procedure to be adopted for securing the extradition of a fugitive offender varied according to the class of State which sought to obtain the surrender. The first division was into (i) States to which the Extradition Acts, 1870 and 1873, applied and (ii) States to which the Extradition Acts, 1870 and 1873, did not apply.

The States to which the Extradition Acts applied are by section 2 (*b*) of the Indian Extradition Act, 1903, for the purpose of that Act, defined to be "Foreign States". They are the foreign countries with which the English Crown had concluded extradition treaties, and to which the Extradition Act has been applied by Order in Council under section 2 of the Act of 1870. A separate list of these countries with the date of the treaty and the Order in Council applying the same, so far as India is concerned, is given in Appendix B of Muddiman's "Law of Extradition" (1914 Edition); and a list is given in Halsbury's "Laws of England", (Vols. 5 and 16) and the substance of these treaties themselves is reproduced in Piggott's "Law of Extradition," Appendix II, page 25 and following. It will be seen that it includes all the free civilised nations. The procedure to be adopted on an application by a State of this class is that laid down in Chapter II of the Indian Extradition Act, 1903. In the case of States to which the Extradition Act did not apply, *i.e.*, States which are not Foreign States for the purpose of the Indian Extradition Act, 1903, a further division must be made, *viz.*, (i) States with which there is a treaty and (ii) States with which there is not a treaty. Section 18 provides that where a treaty is in force, the procedure laid down therein shall be followed, and that the procedure laid down by Chapter III of the Indian Extradition Act shall be modified to that extent. Where there is a treaty, it is necessary to consult its provisions. Where no treaty exists, then the procedure laid down in Chapter III of the Indian Extradition Act, 1903, must be followed ; but here again States can be divided into (i) States where there is a Political Agent in or for such State ; and (ii) States without such an officer. In the case of the first class alternative procedures are available *viz.*, (*a*) to apply to the Political Agent for the issue of a warrant under section 7 of the Indian Extradition Act, 1903, or (*b*) to

make requisition to Government for surrender under section 9 of that Act. In the case of the second class only the latter procedure is available. Besides these two categories, we have the Fugitive Offenders Act. Section 36 of the Fugitive Offenders Act, 1881, allowed that Act to be applied by Order in Council, subject to such conditions, etc., as may be specified, to any place outside the dominions of the Crown in which the Crown exercises jurisdiction; and where such an order has been made the surrender of persons who have fled to British India will be regulated by the Act read with the Order in Council.

Thus, we arrive at this position, *viz.*, that at the time of the passing of the Indian Extradition Act, 1903, there were three enactments side by side, *viz.*, (1) Parliamentary Extradition Act applicable with English Treaty and Order in Council; (2) Indian Act, Chapter III, applicable for any country to which item I does not for the time being apply; and (3) Fugitive Offenders Act.

Thus, the correct view is that the English Extradition Act, Chapter II and the Indian Extradition Act, Chapter III, exhaust all the countries. The Fugitive Offenders Act is a special Act which made special provision for one category out of Chapter III. Chapter III is the genus (not foreign States and Fugitive Offenders) and Chapter IV is the species, prescribing a special procedure for British possessions formed into a group by reason of their contiguity or otherwise.

As Chapter III would apply to any country in the world so long as the Parliamentary Extradition Act does not apply, it is a complete Indian enactment on the subject of extradition supplementing, the Parliamentary Extradition Act wherever the latter is not applicable or even becomes not applicable. We have to bear in mind the significant words "Foreign States for the time being".

In this connection three points have got to be noted. The Preamble of the Indian Act states that it is an Act to amend the law in cases to which the Parliamentary Extradition Act does not apply for the time being. The words "for the time being" make the meaning of Foreign State ambulatory and as a necessary result make the meaning of the words "State not being a Foreign State", in sections 7 and 9 ambulatory. On this basis the Fugitive Offenders Act is a law relating to a species, *viz.*, British Dominions, out of the genus being the larger category, namely, any State not being a State to which the Parliamentary Extradition Act, applies.

In these circumstances, the logical conclusion is that Dominions also are within the ambit of Chapter III. The reason why the Fugitive Offenders Act is applicable to Dominions was because it is a special provision relating to Dominion. But for this provision these Dominions also would be within the ambit of Chapter III. Therefore, when a special provision fails, because the Fugitive Offenders Act is held inapplicable to India after 1950, the case of Dominions would be governed by Chapter III.

Part Two.—The Indian Independence Act of 1947 provides that in consequence of the setting up of the new Dominion of India as from the appointed day, His Majesty's Government in the United Kingdom will have no responsibility as respects the Government of any of the territories which immediately before that day, were included in British India and that no Act of Parliament of the United Kingdom passed on or after the appointed day shall extend or be deemed to extend to the new Dominion, unless it is extended thereto by a law of the Legislature of the Dominion. No Order in Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend or be deemed to extend, to the new Dominion as part of the law of that Dominion. Therefore, the British Government cannot bind us by reason of anything done after the appointed day regarding extradition. Now the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all the enactments amending or supplementing the latter Act, were repealed under Article 395 of the Constitution of India. But Article 372 of the Constitution continues, subject to the other provisions of the Constitution, all the laws in

force in the territory of India immediately before the commencement of the Constitution. Such laws include personal laws like those governing the Hindus, and Mohammadans. It should, however, be observed that to the extent that the laws thus continued contain provisions inconsistent with or repugnant to the Fundamental Rights guaranteed in Part III of the Constitution, those provisions would be treated as repealed and inoperative by reason of Article 13 of the Constitution. By virtue of clause (2) of Article 372 of the Constitution of India, the President made the Adaptation of Laws Order, 1950, published in the *Gazette of India*, Extraordinary, page 449, dated the 26th January, 1950. The Indian Extradition Act was one of those Acts so adapted.

Part Three.—Subsequenty in *The State of Madras* v. *C. G. Menon and another*[1], the Supreme Court had to consider the continued applicability of the Fugitive Offenders Act, 1881, which was applicable to India as a British possession prior to Independence : see section 12. By Orders in Council under this enactment, British India as a British possession was grouped along with Ceylon, etc. Within this group special provision was made for the backing of warrants for the arrest of offenders. The question which was considered by the Supreme Court was whether a warrant issued by a Magistrate in Malaya could be executed without any enquiry on an endorsement of a Magistrate in Madras. Their Lordships answered the question in the negative. In this connection the decision in *Re: Government of India*[2], may be referred to. It related to the motion for the issue of a writ of *habeas corpus* by a Pakistani national. The applicant had been charged with having committed forgery in India and while the trial was proceeding in Bombay, he broke his bail and fled to Pakistan and thence went to England. At the instance of the Government of India, the Metropolitan Magistrate at Bow Street, arrested the applicant under the provisions of the Fugitive Offenders Act, 1881, and the motion for the writ was grounded on the contention that the Fugitive Offenders Act, 1881, ceased to govern the relations between India and the United Kingdom when the former became a Republic, though continuing as a member of the Commonwealth. This contention was rejected and the application refused by a Divisional Court, the judgment being delivered by Goddard, C.J. The learned Chief Justice referred to the Order in Council of 1904, issued under section 12 of the Fugitive Offenders Act, applying the Act to India when it was then part of the Sovereign's dominions and to the changed status of India, a Republic and added that the Act continued to operate by virtue of section 1 (1) of the India (Consequential Provisions) Act, 1949, which provided for the continuance of all existing laws, until provision to the contrary was made by the authority having power to alter the law to have the same operation in relation to India and to persons and things in any way belonging to or connected with India, as it would have if India had not become a Republic. He, therefore, held that the Magistrate had jurisdiction to effect the arrest.

Having examined the provisions of the Indian Extradition Act its scope and operation from 1903 to 1947 and 1947 to 1950 and 1950 down to *Menon's Case*[1] let me examine the five contentions of Mr. T. M. Kasturi in support of his submission that the Extradition Act in so far as it applies to rendition of fugitive offenders to a fresh Government is *ultra vires* and the enquiry of the petitioner based upon G. O., dated 11th April, 1956, is not legal.

The first contention of Mr. T. M. Kasturi is that the Parliamentary enactments which applied to British India should be held to be inoperative in India after India became a Republic on a proper construction of section 18 (3) of the Indian Independence Act. It is unnecessary for us to discuss this contention at great length, because on a similar contention in regard to another Act containing similar provisions, Indian Copyright Act (III of 1913), Rajagopala Ayyangar, J., in *Macmillan & Co.* v. *Little Flower Co.*,[3] has negatived this contention. In regard to the Indian Independence Act, by section 6, clause (4), Acts of Parliament made on or after

1. (1954) S.C.J. 621 : (1954) 2 M.L.J. (S.C.) 197 : (1955) 1 S.C.R. 280.
2. (1952) 1 All E.R. 1060.
3. I.L.R. (1959) Mad. 484.

the appointed date (15th August, 1947) were not to extend to the Dominions *as part of* the law of that Dominion. This phrase " part of the law of the Dominion " refers to Parliamentary enactments which extend to India and therefore, are part of the law of India. The contrast may be seen in section 18 which preserves existing laws and corresponds to Article 372 of the Constitution. Clause (1) of section 18 refers to Act of Parliament made before the 15th August, 1947, which operates otherwise than as part of the law of British India and provides for adapting them. Sub-section (3) continues the " Law of British India ". Therefore, with reference to Parliamentary enactments made before 15th August, 1947, they are classified by the Independence Act into those which operate as part of the law of India, that is, laws which by their own force extend to India and others which operate otherwise than as part of the law of British India. Thus, all Parliamentary enactments which are part of the law of India continue in force in India under section 18 (4) of the Indian Independence Act. Those which would have effect in England but are not part of the law of India would in their application to India have to be construed with reference to the division of India into two Dominions.

Even after 15th August, 1947, Paliament can make laws which would in England have effect with reference to Indian matters. They would be laws operating otherwise than as part of the law of India. Illustrations of this are : The Citizenship Act, 1949, in its impact on Indians ; the India and Burma Consequential Provisions Act, 1949.

Then when the Constitution of India came into force on 26th January, 1950, it did not mean that the laws which existed in India prior to the Constitution, notwithstanding that they trace their origin to either Indian Legislatures constituted under British enactments or enactments of British Parliament which either extended of their own force or were made applicable by ancillary Indian Legislation, stood automatically wiped out. Article 372 of the Constitution provided for the continuance in force of the *existing laws*. The reference to the *law-making bodies* in the definition of *existing law* in Aritcle 366 (10) of the Constitution is wide enough to include an outside body like the Parliament of the United Kingodm. It is an accepted view in International Law that the emergence of a new State or change of sovereignty in a State does not bring about a break or interregnum in law. A law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty: (Hyde in his "International Law", at page 397). Once created it persists until a new sovereign by a legislative Act creates a change : see also *Armstrong* v. *Wickland*[1]. India continues to be a member of the Commonwealth and the Court should not so adapt the Indian Extradition Act, 1903, as to eliminate the provisions in the enactment worked into it, merely because those incorporations operated by virtue of tne legislation of the United Kingdom. Therefore, Chapter III of the Indian Extradition Act will continue to operate until the Indian Legislature chooses to legislative on the subject.

The next contention of the learned advocate Mr. Kasturi is that by virtue of the decision in *The State of Madras* v. *C. G. Menon and another*[2], the Indian Extradition Act must be deemed to have been struck down by the Supreme Court. But the judgment of the Supreme Court itself makes clear that only Part II of the Fugitive Offenders Act, has been struck down. Their Lordships point out :

> " We do not think that it is necessary in the present case to enter into a discussion of the question whether British possessions with which India was grouped (*e.g.*, Ceylon) under Part II of the Fugitive Offenders Act, 1881, should now be treated as foreign States *qua* India and that offenders apprehended can be surrendered under the Indian Extradition Act or other law, provided a *prima facie* case is made against them as the proceedings taken against the respondents were specifically taken under section 14 of the Fugitive Offenders Act, 1881, and it is not the practice of this Court to decide questions which are not properly raised before it or which do not arise directly for decision."

1. (1924) 2 Ir. R. 139.
2. (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 : (1955) 1 S.C.R. 280 (S.C.).

Therefore, Chapter III of the Extradition Act has not been struck down by the decision of the Supreme Court in the above case.

The third contention of the learned advocate Mr. Kasturi is that Chapter III of the Extradition Act is not separable from the part struck down. But as pointed out by the learned Advocate-General, applying the principle of separability laid down in a Bench decision of this Court in *Achar* v. *State of Madras*[1], the part struck down is clearly separable from Chapter III of the Indian Extradition Act and this is indicated in the extract from the judgment of the Supreme Court just now set out above. In *Achar* v. *State of Madras*[1], the learned Chief Justice has examined this doctrine of separability referring to Willoughby on the "Constitution of the United States," Second Edition, at pages 36-37; Cooley in "Constitutional Limitations", 8th Edition, page 360 and following and the Privy Council decisions in *The Initiative and Referendum Act, In re*[2], and *Attorney-General for British Columbia* v. *Attorney-General for Canada*[3], and held that the test in all these cases should be whether omitting the offending provisions the remaining provisions can stand on their own. In this case it cannot be said that all these provisions are connected in subject-matter dependent on each other and operating together for the same purpose or essentially and inseparably connected in substance so that when the unconstitutional portion is struck down that which remained is incomplete and in itself incapable of being executed. The two provisions are certainly not interwoven and it cannot be said that if one portion failed the other portion cannot stand on its own. Even if there was no Fugitive Offenders Act, Chapter III will apply as a dominion will not become a foreign State. Therefore, Chapter III of the Extradition Act cannot be deemed to have also been struck down by reason of its inseparability from the part struck down by the Supreme Court relating to a special procedure, backing of warrants applicable to a group of possessions.

The learned advocate Mr. Kasturi next delicately and tactfully suggested that when the Ceylon Government has been widely reputed to be less than fair to the Indian citizens why should we lean over backwards and surrender our citizens? But without delving into a province which is not ours, the Ceylon Government as a matter of fact it may be pointed out has made an advantageous reciprocal arrangement in regard to the surrender of fugitive offenders in Ceylon to India. The Ceylon Government has included India as one of the countries which can extradite fugitive offenders to India by mere backing of warrants. In other words, whereas we can get extradition of fugitive offenders from Ceylon by the simple procedure of backing of warrants without enquiry, Ceylon can extradite fugitive offenders to Ceylon from India only after an enquiry. Therefore, there is certainly no want of reciprocity. On the other hand, the Ceylon Government is more generous in this respect than India.

The final argument of Mr. Kasturi seems to assume that by extraditing fugitive offenders to Ceylon we are somehow impairing the Fundamental Rights conferred by our Constitution on the Indian Citizens and " that we are impairing the liberty of the Indian citizens by putting him in jeopardy without due process of law" (See Memorandum of Revision.) But this is not a correct view. All nations are equally interested in the suppression of crime. Therefore, the handing over of a fugitive from justice by the country in which he is found to the country demanding him is nothing more than a reciprocal surrender of criminals in the common interest of civilised communities. In bygone times common criminals had rarely the opportunity of escaping, and only the so-called political criminals sometimes succeeded. Quick transporation has altered radically this state of things. Then on account of the variations in the definition of crime in different countries there had been a reluctance to surrender persons who have not committed offences against the laws of the country in whicht hey are actually present. (Encyclopaedia Brittanica (1951 edition.): Extradition Act, Vol. 9, page 1 and following). Therefore, in course of time treaties have been

1. (1954) 1 M.L.J. 102 : I.L.R. (1954) Mad. 908.
2. L.R. (1919) A.C. 935.
3. L.R. (1937) A.C. 377.

entered into and Extradition Acts have been enacted which obviate these impediments in the way of surrender of fugitive offenders. In the present case, it will be noticed Chockalingam Chettiar is not a political criminal and the offence of which he is accused, *viz.*, under section 392 of the Ceylon Penal Code corresponds exactly to section 409 of the Indian Penal Code. Therefore, no question of any infringement of Fundamental Rights is involved and in fact as Piggott points out:

> "The duty to extradite as a common law duty of the Executive in aid of a general system of punishment of criminals is a pleasant myth ; at the best it is a political duty. . . . . it is involved in that large word 'comity'" [Extradition, 1910, P. 8].

> "The principle is that a State against whose laws a person subject to their obligations has committed an offence is entitled to ask as a matter of international courtesy that the authorities of the place in which he has taken a refuge shall assist in his being brought to justice by surrendering him to the country whose tribunals are entitled to punish the offence committed." (Clarke, p. 223).

The consequence of disregard of that comity will only lead to virtual exclusion of citizens of this country from all foreign countries, because no country is going to tolerate Indian citizens coming and injuring their citizens, and then escape and become untouchable ; and secondly this country will be helpless if culprits committing offences here slip out to contiguous countries. It would lead to an unenviable state of things all round. In fact as Bentham wittily pointed out in another connection

> "If all the criminals of all countries had assembled and framed a system after their own wishes is not the abolition of Extradition the very first which they would have established for their security ?"

The net result is that Chapter III of the Indian Extradition Act has not been struck down and is applicable and under its provisions fugitive offenders in India on requisition after due compliance with the provisions prescribed thereunder and if a *prima facie* case is made out, can be extradited to Ceylon.

I wish to acknowledge my indebtedness to the exhaustive arguments of the learned advocate Mr. T. M. Kasturi and the luminous exposition of the Law of Extradition by the learned Advocate-General, which were of great assistance.

Anantanarayanan, J.—This is a reference by our learned brother (Somasundaram, J.) arising from a revision proceeding before him against the order of the Collector and Additional District Magistrate of Ramanathapuram at Madurai. The facts are that a complaint was laid before the Chief Magistrate of Colombo (Ceylon) in C.C. No. 28703/A on his file against the revision petitioner (K.R.P.L. Chockalingam Chettiar) for an alleged offence of criminal breach of trust upon several counts.. The Ceylon Government made requisition for the extradition of this person, who was then at Tiruppattur Taluk of Ramanathapuram district. The position appears to be that though there is no treaty for extradition between the Republic of India and Ceylon, that country has specifically enacted (by the Extradition (India) Act XV of 1954) that the Fugitive Offenders Act of 1881 was applicable in their relations to India. Thereupon, the Madras State Government (Home Department) issued a memorandum requesting the Additional District Magistrate to make an enquiry under section 3 of the Indian Extradition Act (XV of 1903). The learned Magistrate made an enquiry and after holding that a *prima facie* case was established, committed the prisoner to prison to await the orders of the Central Government under section 3 (4) of the Indian Extradition Act.

It was contended before the learned Judge (Somasundaram, J.) that the Indian Extradition Act was enacted prior to the attainment of Insependence by India, when India was a British possession, and that Chapter II of the Indian Act was applicable to those States to which the Engligh Extradition Acts of 1870 and 1873 applied, while Chapter IV was made specifically applicable to those Dominions to which the Fugitive Offenders Act, 1881, and particularly the procedure laid down in Part II of that Act, had relevance and application. After the attainment of Indpendence by this country, the provisions of the Fugitive Offenders Act of 1881, and specifically Part II of that Act, have been held to be inapplicable and void of force, since India could not be described as a British possession in the term of that statute, nor grouped by

an Order in Council amongst those possessions (*State of Madras* v. *C.G. Menon and another*) [1]. But if the Fugitive Offenders Act did not apply, and Chapter II did not apply for the sufficient ground that Ceylon was not one of those Foreign States with which England had entered into treaty, by virtue of the English Extradition Acts of 1870 and 1873, we were left with Chapter III of the Indian enactment alone. It was sought to be contended before the learned Judge that Chapter III was, in its intendment, enacted to secure the facilities of extradition in respect of those States which were neither Foreign States with whom treaties had been concluded (Chapter II) nor Dominions (Chapter IV), but were in a class apart, namely, Native States. But, since Ceylon was not such a State, Chapter III could not apply. The unilateral invocation of the Fugitive Offenders Act by the Ceylon Government, would not clothe the authorities here with jurisdiction to make an enquiry and to extradite the petitioner, the Fugitive Offenders Act being void in respect of India. This must hence be construed as a *casus omissus*, a contingency not provided for, either by Chapter II or by Chapter III, Chapter IV having been excluded by virtue of the Supreme Court decision in *Menon's case*.[1] The learned Judge (Somasundaram, J.) was of the view that this question was an important one, and formulated the reference to this Full Bench in the following terms :

> "Whether the extradition can legally be made under section 7 or section 9 of the Indian Extradition Act, 1903, to any country to which section 19 of the Act and the Fugitive Offenders Act, 1881, was applicable?"

We have since had the benefit of elaborate arguments upon all aspects of the question by the learned Advocate-General for the State of Madras, and learned counsel for the revision petitioner (Sri T. M. Kasturi). I desire to commence with an analysis of the situation as it was when the Indian Extradition Act, XV of 1903, was enacted and the relation between this comprehensive Act and the English Extradition Acts of 1870 and 1873 (33 and 34 Vict., Ch. 52 and 36 and 37 Vict., Ch. 60) on the one hand, and the Fugitive Offenders Act, 1881 (44 and 45 Vict., Ch. 69) on the other. We may then proceed to scrutinise how this situation was affected by the attainment of Indian Independence, by the provisions of the Constitution, and by the dicta of the Supreme Court in *Menon's case*[1]. The argument is also advanced before us, which will be taken note of later, to the effect that such proceedings of extradition or rendition of the petitioner to the Ceylon Government will be opposed to his fundamental right of free movement and residence in India, under Article 19 (*d*) and (*e*) of the Constitution.

At the outset, some observations are essential about the nature of the legal concept of Extradition, and the part that it has played in International Law. The history of the concept, and its significance as a matter of comparative Law affecting the comity of nations, have been dealt with in detail in the judgment of my learned brother Ramaswami, J., and it is not hence necessary that I should dilate upon this aspect. In Oppenheim's "International Law" Volume 1 (Eighth Edition, Lauterpacht, page 696, Extradition has been defined as—

> "the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory the alleged criminal happens for the time to be."

In Halsbury's Laws of England (Third Edition, Simonds, Volume 16, page 560) a more terse, but equally clear definition, is furnished in the following terms :

> "Extradition is the delivery on the part of one State to another of those whom it is desired to deal with for crimes of which they have been accused or convicted and are justiciable in the Courts of th other State."

It will be found that in *Corpus Juris Secondum* (vol. 35, page 380) a very similar definition is given, in somewhat less academic language. When we review the history of this concept, we find that Grotius expressed a very clear opinion as to the existence of this duty between Sovereign States (*See* passage cited in Clarke upon 'Extradition,

1. (1955) 1 S.C.R. 280 : (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 (S.C.).

Fourth edition, page 2) Vattel also propounded the doctrine in explicit terms. But, as Oppenheim observes, the treaties stipulating extradition between Sovereign States really relate to the 18th and particularly the 19th centuries. Further, States have generally upheld their right to grant asylum to foreign individuals as an inference from their territorial supremacy. Many States such as France and Germany, have adopted the principle of never extraditing one of their own subjects to a foreign State, but themselves punishing their own subjects for grave crimes committed abroad. Some States have enacted special Municipal Laws, which enumerate those crimes for which extradition shall be granted and asked in return, and which, at the same time, regulate the procedure in Extradition cases. Thus, as Oppenheim points out (section 330, page 700) :

> " A conflict between International and Municipal Law may arise if a certain individual must be extradited according to an extradition treaty, but cannot be extradited according to Municipal Law of the State from which extradition is demanded."

Practice is also very widely variant between the Sovereign States. Some States, such as Great Britain, have not adopted the principle that one of their own subjects should never be extradited by a foreign State and make no distinction between their own subjects and other persons who are alleged to have committed extraditable crimes abroad. It is noteworthy that the United States, though they did not press for extradition of Italian subjects who, after committing a crime in the United States returned to Italy, nevertheless considered themselves bound by the Treaty of 1868, to extradite to Italy such American subjects as had committed crimes in Italy. (Oppenheim, section 330, page 700, *Footnote.*)

When we now turn to the situation when the Indian Extradition Act XV of 1903 was enacted, we find that it is as follows: The Extradition Act, 1870 (33 and 34 Vict., Ch. 52) provided under section 17 of that Act that, when applied by Order in Council, it extended to every British possession in the same manner as if throughout the Act, the British possession were substituted for the United Kingdom or England subject to certain modifications. Similarly, under section 18, if the Legislature of any British possession had enacted, a law or ordinance providing for extradition of fugitive criminals, Her Majesty's Government could either (1) suspend the operation within any such British possession of the Act of 1870 or any part thereof or (2) direct that such law or ordinance should have the effect in such British possession, as if it were part of the Act itself. We are not, for the moment, concerned with the procedures provided for in the English Act. But, when we turn to the Fugitive Offenders Act (44 and 45 Vict., Ch. 69) 1881, we find that a certain procedure is provided, including an enquiry by a Magistrate, under Part I of this Act, but that under section 12 (with which Part II commences), there was a separate and far more expeditious procedure for the backing of warrants issued by any member of the group of possessions to which this part of the Act was made applicable by the Crown by Order in Council. As we shall see later, it is this part of this statute which has been struck down in *Menon's case*,[1] as incompatible with the sovereign status of Republic of India.

When we now turn our attention to the Indian Extradition Act (XV of 1903), we notice that the very Preamble states that the intendment is,

> " to provide for the more convenient administration of the Extradition Acts, 1870 and 1873, and of the Fugitive Offenders Act, 1881.";

and further, that the intendment is equally

> " to amend the law relating to the extradition of criminals in cases to which the Extradition Acts 1870 and 1873, do not apply."

As we shall see later, this part of the Preamble has only one possible construction namely that it explains the enactment of Chapter III, separately from both Chapter II and Chapter IV. When we turn to the definitions, we note that under section 2 (*c*) 'Foreign State' is defined as

> " a State to which, for the time being, the Extradition Acts, 1870 and 1873, apply."

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1. (1955) 1 S.C.R. 280 : (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 (S.C.).

This is of great importance, with reference to the present facts, for, as the learned Advocate-General stresses, the very definition has an ambulatory content, in the sense that the treaties so concluded by the Crown with individual Foreign States may either cease, or fresh treaties with them or with other States may spring into existence. If we glance at Part IV, Appendix I of the Extradition Manual, 1940, (page 141), we discover a list of countries with which the Crown had effected Extradition Treaties, which therefore applied to India, as on 1st January, 1938. It may be convenient to mention, in this context itself, that Chapter II deals with the surrender of fugitive criminals in the case of such 'Foreign States', and that under section 18 of the Act of 1870, an Order in Council was issued by the Crown, dated 7th March, 1904, declaring that this Chapter was to have effect in British India, as if it were part of the English Extradition Act of 1870. " Extradition Offence " is defined in section 2 (*b*) and " Offence" is defined in section 2 (*e*). When we come to Chapter III, we shall see that these respective terms have been used in different sections of that Chapter. Since Chapter II applies to "Foreign States", and provides for the relevant extradition procedure, we may leave this part of the Act aside, for a moment, and turn to Chapter IV. Here, we note that the provisions are expressly enacted (under section 19) for the carrying into effect in British India of the provisions of the Fugitive Offenders Act, 1881. We also find that under section 32 of the Fugitive Offenders Act, 1881, an Order in Council was issued by the Crown dated 7th March, 1904, declaring that this Chapter was to be given effect to throughout the Dominions, and the relations of this country with the Dominions were governed by the provisions of this Chapter in the matters relating to extradition.

Chapter III, which is the vital part, of the Act for our interpretation, concerns the 'surrender of fugitive criminals' in cases of States other than "Foreign States". Section 7 (1) with which this Chapter commences, runs as follows :—

> " Where an extradition offence has been committed or is supposed to have been committed by a person in a part of India to which this Act does not extend, or in the territories of any state outside India not being a Foreign State, and such person escapes into or is in the territories to which this Act extends, and the Political Agent in or for such State issues a warrant addressed to the District Magistrate of any district in which such person is believed to be . . . . . for his arrest and delivery. . . . . . such Magistrate shall act in pursuance of such warrant and may give directions accordingly."

Section 9 of this Chapter, which is equally significant is in the following terms:

> " Where a requisition is made to the Central Government by or on behalf of any State outside India not being a Foreign State, for the surrender of any person accused of having committed an offence in the territories of such State, such requisition shall . . . . be dealt with in accordance with the procedure prescribd by section 3 . . . . . ."

Two remarks are essential here, before we pass on. The first is that both under section 7 and under section 9, this Chapter provides for specific procedures by the concerned Magistrate ; but obviously, section 7 requires that the Political Agent of the State outside India has to be satisfied that it is necessary to issue a warrant for the extradition of the offender, whereas section 9 is in wider terms, and refers merely to a requisition to be issued by the State concerned. But section 7 relates to "Extradition Offence" whereas section 9 refers to an "Offence". Before leaving this Chapter, it is also important to note section 18, which runs as follows :—

> " Nothing in this Chapter shall derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly ".

We are now able to view the problem before us, in a clearer light. If we assume that the Indian Extradition Act broadly deals with two categories (1) States to which the English Acts of 1870 and 1873 applied, which are hence " Foreign States" and governed by treaties and the provisions of Chapter II and (2) all other States which are not "Foreign States" so defined, which might be Dominions to which the specific provisions of Chapter IV applied or not as the case may be, the argument of the learned Advocate-General becomes clear. The argument is that the schematic representation of this Act should indicate all non-'Foreign States' as a genus, of which Dominions would only constitute a species. Though Ceylon is such a Dominion, the provisions of Chapter IV no longer apply between this country and Ceylon, since the

Fugitive Offenders Act of 1881 has been declared by the Supreme Court to be void and not in force, after the attainment of Indian Independence. Therefore, automatically Ceylon would fall within the wider class of non-'Foreign States' dealt with in Chapter III, the definition of "Foreign State" itself being a technical one, and there being nothing in the express language to warrant an inference that Chapter III was of restricted application to Native States alone, in the days prior to the attainment of Independence. *Per contra*, the arguments of Sri T. M. Kasturi could be set forth as consisting of the following branches, which ought to be logically distinguished from each other. Firstly, learned counsel contends that Chapter III was, in its intendment, purposively enacted to apply to Native States alone. Consequently, the provisions of this Chapter cannot be invoked to govern extradition relations between this country and Ceylon, which is a Dominion. Chapter IV alone would apply, and since its provisions are nullified by the effect of the dicta in *Menon's case*[1], the present instance would reduce itself to a *casus omissus*, until there is a new and formal understanding between this country and Ceylon. Next learned counsel urges, upon the strength of the same dicta in *Menon's case*[1], that Chapter II is also rendered nugatory, because the very category of "Foreign States" with its ambulatory content (section 2 (*c*)) depends upon a classification made, or treaties effected, by a power outside the Republic of India ; the argument is that this is in derogation of the sovereignty of this country. Since most of the enactmnt is thus rendered invalid, it is argued that the enactment itself is not saved by virtue of Article 372 of the Constitution, and is no longer in force. Thirdly, learned counsel claims that, in any event since the Ceylon Government admittedly moved for extradition of the petitioner, with reference to the Fugitive Offenders Act, 1881, and the provisions of Chapter IV are invalid, the case does not survive to be dealt with under Chapter III at all. In other words, this argument necessarily involves the contention that Chapters III and IV are different in genus or species altogether, and are mutually exclusive.

We shall first deal with the argument that Chapter III was of restricted scope, in intendment, and that it was to apply only to the Native States, as they then were, a class not falling either within the group of Dominions or " Foreign States " as defined in the Act. We think it very probable that Chapter III was enacted, having the special case of the Native States also in mind, and, undoubtedly, the very Statement of ' Objects and Reasons ' (printed at page 1073 of the Criminal Court Manual (Central Acts, 6th Edition)) makes reference, *inter alia*, to this purpose. But the statement itself shows, if indeed it is necessary to look into this, when the language is so clear and explicit, that the ambit of the Chapter is much wider. Learned counsel (Sri T. M. Kasturi refers to the principle of construction laid down in Maxwell), to the effect that the intention of the framers of a statute should be borne in mind, as a canon of interpretation. But the very passage does not support him in the present context, and, since it is of interest and significance, may be cited here :

> "A statute is the will of the Legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded ' according to the intent of them that made it.' If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature." (Maxwell on the *Interpretation of Statutes*, 10th Edition, Page 1).

Again, in Muddiman, " *The Law of Extradition from and to British India* " (2nd Edition, 1927), we find a discussion which throws a clear illumination upon the matter. With reference to the facts of the Portuguese possessions in India, which call for special notice in certain ways, the learned author observes that the Portuguese Treaty Act (IV of 1880) having expired, the Act had been repealed, so that these possessions would come within the category of non-'Foreign States ' (Chapter III).

> " Apparently, therefore, a requisition under section 9 of the Indian Extradition Act, 1903, is the only course now available."

The learned Advocate-General conceded, with fairness, that this observation by the learned author may not be conclusive by any means. But it certainly supports the plain and *ex facie* interpretation of the language used. It is urged that, since

1. (1955) 1 S.C.R. 280 : (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 (S.C.).

section 7 refers to a warrant to be issued by a Political Agent, the Native States were meant. We need only point out that there are no grounds for the assumption, that Political Agents were not also stationed at that time in other States such as Nepal, or in French possessions like Pondicherry, etc. Further, section 9 itself bears evidence that the ambit of the Chapter is much wider, and that it cannot be so restricted in scope.

In other words, our interpretation of the scheme of these Chapters points to the necessary inference that Chapter II deals with the category of "Foreign States" technically defined, and Chapter III deals with all other States, constituting a genus. Chapter IV is a special procedure applicable to Dominions, which seem entitled to the preference of a more expeditious extradition, including the 'Backing of Warrants.' We may now turn to *Menon's case*[1], in order to see how far the argument is sustainable that the dicta in that case should have the effect of rendering the Indian Extradition Act itself nugatory, after the attainment of Indian Independence.

We may first refer to the Supreme Court decision in *Dr. Babu Ram Saksena* v. *The State*[2]. This is instructive on account of the fact that, in spite of the existence of an extradition treaty under which the other party had more restricted obligations in the matter of rendition of criminals, the Supreme Court held that, because it provided for additional offences, the Extradition Act of 1903 did not derogate from those provisions. As observed by Patanjali Sastri, J., (page 579):

> "This statutory authority to surrender cannot of course enlarge the obligation of the other party where an extradition treaty has been entered into, and this is made clear by section 18. But it is equally clear that the Act does not derogate from any such treaty when it authorises the Indian Government to grant extradition for some additional offences, thereby enlarging, not curtailing, the power of the other party to claim surrender of criminals."

We would stress this aspect of the matter, in order to emphasise the necessity for a liberal and beneficient construction of the provisions of the Indian Extradition Act, in the interest of the comity of nations, particularly where, as in a case like this, there is full reciprocity from the other State. Of course, the matter would be wholly different, if the revision petitioner had not committed any offence or offences *prima facie*, as defined in our Municipal Law, namely, according to the Indian Act and its Schedules. But it is not claimed that that is the case.

When we now come to *Menon's case*,[1] particular stress is laid by learned counsel for the petitioner upon the following two passages in the judgment of M. C. Mahajan, C.J. Their Lordships laid down at page 287:—

> "The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of Independence and the coming into force of the new Constitution, by no stretch of imagination could India be described as a British possession, and it could not be grouped by an Order in Council amongst those possessions. Truly speaking, it became a foreign territory so far as other British possessions are concerned, and the extradition of persons taking asylum in India, having committed offences in British possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation....Article 372 of the Constitution cannot save this law because the grouping is repugnant to the conception of a Sovereign Democratic Republic."

We note that the decision actually strikes down the provisions of Part II of the Fugitive Offenders Act, 1881, and that it is specific authority for the view that the Indian Extradition Act, 1903, though adopted under the provisions of Article 372 of the Constitution, has not kept those provisions alive. But, undoubtedly, the effect of the observations of the Supreme Court, even though *obiter*, must be given effect to by the High Courts as far as it lies in their power; and there can be no question that even *obiter* observations of the Supreme Court are authoritative as pronouncements of the law laid down. But we are quite unable to see how these observations, even by implication, warrant any inference that the Indian Extradition Act itself does not survive, because the provisions of Chapter IV of that Act are in derogation of Indian Sovereignty. A very similar argument was put forward before Rajagopala Ayyangar, J., in *Macmillan & Co.* v. *Little Flower Co.*[3], and the learned Judge pointed out, with reference to *Menon's case*[1], that:

1. (1955) 1 S.C.R. 280: (1954) S.C.J. 621: (1954) 2 M.L.J. 197 (S.C.).
2. (1950) S.C.J. 406: (1950) S.C.R. 573.
3. I.L.R. (1959) Mad. 484.

"It would not be correct to regard that the Fugitive Offenders Act, 1881, had ceased to operate for all purposes as far as India is concerned. *Menon's case*[1] was concerned with the political ties brought into being between disperate units of the British Empire by Legislation of the Imperial Parliament. ......I am unable to find any basis for the argument that the only laws in force at the date of the Consitution and which survived the emergence of India as a Dominion or as a Sovereign Republic were those laws which were enacted by the Indian Legislature and that British Parliamentary legislation therefore applicable to India automatically ceased to operate.......If the argument of learned counsel were pushed to its full length, it would follow that as the British Indian Legislatures were themselves the creatures of British Parliament, the laws passed by them would have to suffer a similar eclipse."

Again, as the learned Advocate-General points out, it is not as if the further validity of the Indian Extradition Act implies that the British Parliament still retains the initiative, even after the attainment of Indian Independence, to make extradition treaties which would bind this country. Had that been the case, the argument is certainly tenable that such provisions are in derogation of the sovereignty of this country, and, since they have the effect of virtually reducing this country to a British possession, in that respect, are invalid. Such an argument quite overlooks the true constitutional position after the attainment of Indian Independence. As stated in Halsbury (Third Edition), Simonds, Volume 5, page 529)

"From 15th August, 1947, the United Kingdom Government ceased to have responsibility for any of the territories in British India, and the suzerainty of the Crown over the States lapsed, and with it all treaties, and agreements between the Crown and their Rulers and all functions, rights and obligations of the Crown in relation to them."

Under section 6, clause (4) of the Indian Independence Act of 1947, Acts of Parliament on or after the appointed day (15th August, 1947), were not to extend to the Dominions as part of the law of that Dominion "unless it is extended thereto by a law of the Legislature of the Dominion". With reference to Parliamentary enactments prior to 15th August, 1947, those which are classified by this Act as part of the law of India, continue in force in India under section 18 (4). But after 15th August, 1947, Parliament cannot make any laws or exercise any powers which would operate as part of the law of India in India, and the rights of this country with regard to the making of extradition treaties, or regulating extradition procedures, are therefore unfettered and absolute. It is sufficient to add that 'Extradition' is a subject specifically provided for as the object of Legislation, as Item 18 of the seventh Schedule, List I, in the Constitution of India. We would also refer to section 18 of the Indian Extradition Act itself, cited earlier.

With regard to the effect of a pronouncement that certain provisions of this Act, such as those relating to Part II of the Fugitive Offenders Act, 1881, enacted as Chapter IV, were rendered nugatory as in derogation of the sovereigns, status of India, upon the rest of the Act, or the Act considered as a whole, reference might be made to the decision of this Court in *A. R. V. Achar* v. *State of Madras*[2]. Applying the test laid down in this decision, there can be no doubt that the provisions of Chapter III, with which we are now concerned, are perfectly valid and can stand by themselves, even if certain provisions in Chapter IV are to be considered as struck down. Again, we are unable to see how any other construction is possible, since that would really involve the assumption of a total vacuum in the law relating to Extradition and Extradition procedures governing this country, and all other countries in relation to this country, of the comity of nations; for the argument would equally strike down not merely the Act itself but all previous treaties and international agreements. We have hence no hesitation in concluding that the Indian Extradition Act, and Chapter III thereof, do survive, and are part of the law of this country, as saved by the effect of Article 372 of the Indian Constitution. We must further hold that, in the present case, since the procedure, relevant to the Fugitive Offenders Act of 1881 does not apply, the case must fall within the wider ambit of Chapter III itself, and be governed by the provisions of

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1. (1955) 1 S.C.R. 280 : (1954) S.C.J. 621 : (1954) 2 M.L.J. 197 (S.C.).

2. (1954) 1 M.L.J. 102 : I.L.R. (1954) Mad. 908.

section 7 or 9 of the Chapter, as the case may be. The rendition of the revision petitioner to the Ceylon Government, under Chapter III, after compliance with the necessary procedure and formalities, would therefore, be perfectly proper, and in accordance with the law.

We accept the arguments of the learned Advocate-General upon the schematic analysis of the Indian Extradition Act, that Chapter III constitutes the genus of non-'Foreign States' of which the 'Dominions' (Chapter IV) form a species. Nor have we the slightest warrant for the assumption that Chapters III and IV are mutually exclusive categories.

The final argument of learned counsel for the petitioner that such rendition constitutes an infringement of the fundamental rights guaranteed under Article 19 (*c*) and (*d*) of the Constitution, appears to be based upon a misconception of those rights. As was held in *A. K. Gopalan's case*[1], itself by the Supreme Court, the imprisonment of a criminal, or of a person who is arrested and detained according to law for an alleged crime, does not offend any fundamental right. To hold otherwise, would result in a virtual paralysis of the administration of criminal justice. Since 'Extradition' is a specific subject for the exercise of legislative competence under the Constitution, it follows that the rendition of offenders for extraditable offences cannot be in derogation of the fundamental rights of freedom of movement or residence, and that this restriction is "in the interests of the general public", (Section 19 (5)). This is not a case of externment, like *Dr. Khare* v. *State of Delhi*[2] but a case of rendition for trial to another country, in accordance with International Law and the Municipal Law of this country. We overrule this contention accordingly.

In the result, we would answer the reference by the conclusion that, in the circumstances under which the reference was made, extradition is legally permissible under the provisions of section 7 or section 9 of the Chapter III of the Act, though the provisions of the Fugitive Offenders Act, 1881, invoked by the Ceylon Government, are no longer in force in this country.

We desire to acknowledge our indebtedness to the learned Advocate-General and the learned counsel for the Revision-Petitioner (Sri T. M. Kasturi) for the great care and pains taken to elucidate the problems of interpretation arising from this reference.

After the Full Bench answered the reference, the petition came on for disposal before *Somasundaram, J.* The Court made the following

ORDER.—The question that was referred to the Full Bench has been answered against the petitioner. There is no other ground for interference. The Petition is dismissed.

V.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

Periaswamy Gounder .. *Petitioner.**

Madras Prohibition Act (X of 1937), section 4 (1) (j)—Charge of consuming prohibited alcohol—Proof and onus.

Where the signs found on the medical evidence were (1) breath smelling of alcohol, congestion of the eyes, dilation and sluggish reaction to light of pupils but speech and gait were normal the prosecution cannot be said to have discharged the onus of proving that the accused had consumed

1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42. 2. (1950) S.C.J. 328 : (1950) S.C.R. 519.

* Crl.R.C. No. 19 of 1959. (Crl.R.P. No. 19 of 1959.) 19th August, 1959. (28th Sravana, 1881, Saka).

prohibited alcohol. Those symptoms could very easily have been produced by consumption of medicinal preparations which the accused alleged he had consumed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the District Magistrate (J), Tiruchirapalli, dated 26th December, 1958, in Criminal Appeal No. 511 of 1958 (C.C. No. 1536 of 1958, Court of the Sub-Magistrate, Jayakondam).

K. Narayanaswami Mudaliar, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—The revision petitioner has been convicted under section 4 (1) (*j*) of the Madras Prohibition Act, and sentenced to payment of a fine. The facts are almost identical with those in the case decided by Somasundaram, J., recently (Crl. R.P. No. 1022 of 1958)[1], and that is clear authority for the view that, where the appearances referred to in the decision are alone present, without further definite symptoms, no presumption arises that the offender had consumed prohibited alcohol. In such circumstances, it is duty of the prosecution to prove that prohibited alcohol had been consumed, and this proposition has been enunciated upon the authority of the Supreme Court decision in *B. K. Pesikaka* v. *State of Bombay*[2], and following the decision of the Madras High Court in *Palani Goundan* v. *The State*[3]. In the present matter, the signs found, according to the medical witness (P.W. 2) were purely these: the breath smelling of alcohol, congestion of the eyes, and dilation and sluggish reaction to light of the pupils. The speech and gait were normal, and this is a very significant circumstance. The defence was that the revision petitioner had consumed some indigenous medicine containing alcohol, prescribed for him by a homoeopathic practitioner. The symptoms noticed in the present case could very easily have been caused by the consumption of such a drug, and the absence of more definite symptoms is at least an indication that prohibited alcohol was not consumed.

In any event, the prosecution totally failed to discharge its burden of proof that the evidence was sufficient to warrant an inference that prohibited alcohol had been consumed. I, therefore, allow the revision and set aside the conviction and sentence upon the petitioner. The fine, if paid, will be refunded.

K.S. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM.

Rathinam .. *Petitioner*.*

Madras Prohibition Act (X of 1937), sections 4 and 41-A—Offence of consuming prohibited alcohol—How established—Evidence of doctor not authorised under section 41-A—If inadmissible.

Section 41-A of the Madras Prohibition Act is intended to compel persons taken to a doctor to submit for examination and any resistance to such examination entails the penalties provided for in that regard. The police should take the person suspected of an offence under the Prohibition Act to a doctor authorised under section 41-A of the Act. But the evidence of a doctor, not authorised under section 41-A of the Act, but who examined the accused does not become inadmissible merely because he is not authorised under section 41-A of the Act.

In a prosecution under section 4 (1) of the Act it is the duty of the prosecution to prove that the smell detected was that of a liquor that came within the category of prohibited alcohols as smell, dilating pupil, etc., can be explained on the basis of taking alcohol of the exempted category as well.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate (J), Tiruchi-

1. Since reported as *Rathinam,* In re (1960) 2 M.L.J. 449.
2. (1955) S.C.J. 73 : (1955) 1 M.L.J. (S.C.) 32 : (1955) An. W.R. (S.C.) 32.
3. (1956) 2 M.L.J. 273.

*Crl.R.C. No. 1022 of 1958. (Crl.R.P. No. 979 of 1958.) 31st July, 1959. (9th Sravana, 1881, Saka.)

rapalli, dated 12th November, 1958, in C.A. No. 421 of 1958 (C.C. No. 2080 of 1958, Sub-Magistrate, Musiri).

K. Narayanaswami Mudaliar, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—The petitioner was convicted under section 4 (1) (*j*) of the Madras Prohibition Act for consuming liquor. The evidence of the doctor, who examined the petitioner, is that the pupils of the accused were dilated reacting to light sluggishly and that there was smell of arrack in the breath. On this evidence he was convicted. It is contended before me that the doctor was not authorised under section 41-A, and therefore his evidence should not be acted upon. It is conceded that the doctor was not authorised under section 41-A. But the fact he is not authorised does not mean that the evidence he gave is inadmissible. Section 41-A of the Madras Prohibition Act is intended to compel persons to be taken to a doctor and any resistance of submission to an examination entitles the persons to certain penalties according to the provisions of the section. Although under section 41-A the police shall take him to a doctor, who is authorised, still the evidence given by the doctor, who is not authorised, does not become inadmissible. There is, therefore, no force in the contention.

There is another point in the case which though not raised deserves consideration. That is the prosecution has not established that the symptoms exhibited by the accused are symptoms, which must necessarily arise from the consuming of prohibited alcohol. The Supreme Court in *Behram Khurshed Pesikaka* v. *State of Bombay*[1], has pointed out as follows :—

"The bare circumstance that a citizen accused of an offence under section 66 (*b*) is smelling of alcohol is compatible both with his innocence as well as his guilt. That being so, it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus is not discharged or shifted by merely proving a smell of alcohol".

In interpreting the decision of the Supreme Court our Court has held in *Palani Goundan*, In re[2], that even if the smell, redness of the eyes and dryness of tongue which were found in a particular case, might be explained as due to the accused taking the mixture and tonic, the other two symptoms of incoherent speech and staggering gait had not been explained. Thus the smell and the dilation of pupil might be explained on the basis of taking alcohol of the exempted category. The prosecution has not, therefore in my opinion, established the guilt of this accused for having consumed prohibited alcohol. Though this point was not raised, still it is open to me to go into this question and consider whether the guilt has been established beyond all reasonable doubt. The guilt has not been so established. The conviction and sentence are set aside and the accused is acquitted.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Athipalayan and others .. *Accused**.

Criminal Procedure Code (V of 1898), sections 366 and 367—Mode of delivering judgment—Conviction and sentence noted in the docket sheet only—No judgment written at all—Procedure is illegal—Conviction and sentence must be set aside.

Sections 366 and 367 of the Code of Criminal Procedure require that the judgments must be pronounced in open Court, signed and dated. Where the Magistrate had merely noted in the

1. (1955) 1 M.L.J. (S.C.) 32 : (1955) An.W.R. (S.C.) 32 : (1955) S.C.J. 73 (S.C.).
2. (1956) 2 M.L.J. 273.

*Crl.R.C. Nos. 1414 to 1417 of 1959. (Case Referred Nos. 33 to 36 of 1959.) 9th February, 1960. (20th Magha, 1881, Saka.)

docket sheet the conviction and sentence and no judgment had been written at all, this would be an illegality rendering the conviction and sentence liable to be set aside.

Cases referred for the Orders of the High Court under sections 435 and 438 of the Criminal Procedure Code, by the District Magistrate (J), Salem, in his letters C.R.P. Nos. 34, 37, 35 and 36 of 1959, dated 3rd December, 1959.

M. Narayanamurthy and the Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—This batch of revision cases raises a point of considerable importance in the day-to-day administration of justice. It relates to announcing sentence before judgment which is the final decision of the Court intimated to the parties and the world at large by formal pronouncement of delivery in open Court by the trial Judge and signing and dating it simultaneously and thereby terminating the criminal proceedings finally (Halsbury 2nd Edition, Vol. 9), pages 260-264: *Emperor* v. *Maheswara Kondayya*[1], *Madho Singh* v. *Emperor*[2], *Kuppuswami Rao* v. *The King*[3], *Hori Ram Singh* v. *Emperor*[4], *Surya Rao* v. *Sathiraju*[5], *Surendra* v. *State of Uttar Pradesh*[6], *Basanta Kumar Pal* v. *Kamini Mohan Pal*[7].

One Sri K. Ramanujam, the Sub-Magistrate of Rasipuram, has convicted the accused in C.C. Nos. 2101, 2113, 2236 and 2257 of 1959 under section 4 (1) (*j*) of the Madras Prohibition Act. In all these cases the accused has been sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 5. It has been proved beyond doubt and the Magistrate himself admits it, that in none of these cases he wrote judgments and pronounced them and signed and dated them in open Court as required by sections 366 and 367 of the Code of Criminal Procedure. We are not concerned with the *ad misericordiam* explanation and that is a matter for the Administrative Department of the High Court to settle. We are only concerned with this reference made by the District Magistrate that during his surprise inspection of the Rasipuram Court he found that judgments had not been written at all and that the Magistrate had merely noted in the docket sheet the conviction and sentence. Therefore, the District Magistrate has made this reference requesting the High Court to set aside the convictions and sentences.

The learned Public Prosecutor brings to my notice the following decisions on this point: *Bandanu Atchayya* v. *Emperor*[8], where a judgment in a criminal trial was written and delivered some days after the prisoners were convicted and sentenced; and it was held that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity; because it was a defect which vitiated the convictions and sentences. *Queen Empress* v. *Hargobind Singh*[9], approved and *Jhari Lal* v. *King Emperor*[10], where the essential parts of the judgment, that is, the statement of points for determination and the reasons for the decision, were not prepared until three weeks after the pronouncement of the judgment in open Court, and it was held that the defect vitiated the conviction and sentence. *Queen Empress* v. *Hargobind Singh*[9], and *Bandanu Atchayya* v. *King Emperor*[8]. Passing sentence before recording a Judgment is dated and signed is illegal: *Gulla* v. *Emperor*[11], *Queen Empress* v. *Kamthia Girdharia*[12]. A judgment before delivery is a mere opinion; it becomes a Judgment only if pronounced and signed and dated: *Nundeeput Mahta* v. *Alexander Shaw*[13], *Ramdhur*, In re[14], *Surendra* v. *State of Uttar Pradesh*[6], and *Savarimuthu* v. *Muthu Pillai*[15]. Delivery must be in open Court. It must be by

1. (1908) 31 Mad. 543.
2. (1940) 41 Cr.L.J. 725.
3. A.I.R. 1949 F.C. 1.
4. A.I.R. 1939 F.C. 43 : (1938-39) F.L.J. 153 : (1939) 2 M.L.J. (Supp.) 23.
5. (1948) 1 M.L.J. 396 : I.L.R. (1948) Mad. 103 : A.I.R. 1948 Mad. 510.
6. (1954) S.C.J. 12 : (1954) 1 M.L.J. (S.C.) 50 : A.I.R. 1954 S.C. 194 : (1954) S.C.R. 330.
7. A.I.R. 1957 Tripura 55.
8. (1903) I.L.R. 27 Mad. 237.
9. (1892) I.L.R. 14 All. 242.
10. (1929) I.L.R. 8 Pat. 904.
11. A.I.R. 1942 Lah. 100.
12. (1899) 1 Bom. L.R. 160.
13. (1870) 13 W.R. 209.
14. (1913) 14 Cr.L.J. 562.
15. (1916) 32 M.L.J. 81 : 40 Mad. 108.

the Judge and cannot be delegated. It is not a mere formality. *Damu Senapati* v. *Sridhar Rajwar*[1], *Rambit* v. *Emperor*[2], *Tilak Chandra Sarkar* v. *Baisagomoff*[3].

It is unnecessary to further buttress by citations the elementary point of the glorious Anglo-Saxon Criminal Jurisprudence that we administer that firstly no one can be tried or sentenced *in absentia* (except in petty cases and when represeted by a pleader) secondly, the judgment must be pronounced in open Court, signed and dated ; and thereby that if these formasities are not strictly complied with, the conviction and sentence cannot be sustained and they become illegal and there is no question of any irregularity being cured because it is almost impossible that no prejudice thereby will be caused to the accused. This irregularity will amount to an illegality vitiating the conviction and sentence because, as I have just stated. it is one of the glorious principles of our criminal jurisprudence that we do not try or sentence people *in absentia* and we do not also convict and sentence people without judgments being pronounced in open Court and signed and dated then and there. It may be different in the continental system of criminal jurisprudence

Therefore, the references by the learned District Magistrate of Salem are accepted and the convictions and sentences in these cases are set aside. I do not order a re-trial in the context of these cases. This atrocious behaviour on the part of the Sub-Magistrate which plainly unfits him for the discharge of his duties will naturally be adequately dealt with on the Administrative Side of this Court.

V.S. *Reference accepted.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Joseph Sam .. *Appellant**

v.

Caltex (India) Ltd., 202, Mount Road, Madras and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), sections 41 and 51—Scope of.

Section 51 of the Madras Shops and Establishments Act, 1947, does not have the effect of interfering with the functions and jurisdiction of the civil Courts and judicial or quasi-judicial Tribunals to decide whether in the particular circumstances of a case the Act was applicable or not. It is only a miscellaneous provision intended to decide certain questions as far as the department is concerned. Hence an Additional Commissioner for Workmen's Compensation has jurisdiction to decide in an appeal before him the question whether the Act was applicable to the person concerned or not, *viz.*, whether or not he was in the position of management.

Appeal under Clause 15 of the Letters Patent against the Order of Mr. Justice Rajagopala Ayyangar, dated 21st February, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 524 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in M.S.E. Case No. 719 of 1954, on the file of the Additional Commissioner for Workmen's Compensation, Madras and quash the order therein.

S. Mohan Kumaramangalam for *M. K. Nambiyar* and *K. K. Venugopal*, for Appellant.

The Advocate-General (*V. K. Tiruvenkatachari*), instructed by *Messrs. King and Partridge* and the Additional Government Pleader (*M. M. Ismail*) for Respondents 1 and 2.

1. (1893) I.L.R. 21 Cal. 121.
2. A.I.R. 1923 Rang. 44.
3. (1896) I.L.R. 23 Cal. 504.

*W.A. No. 90 of 1957.

7th January, 1960.
(17th Pausa, 1881, Saka).

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the Judgment of Rajagopala Ayyangar, J., dismissing the petition filed by the appellant under Article 226 of the Constitution of India for the issue of a writ of *certiorari*, quashing the order passed by the Additional Commissioner for Workmen's Compensation, Madras, on 1st November, 1955. The appellant was a Depot Operator in the employment of Messrs. Caltex (India) Ltd. On 1st December, 1954, he was dismissed from the service of the Company after an enquiry by an Officer of the Company deputed for the purpose. Against this order of dismissal, the appellant filed an appeal under section 41 (2) of the Madras Shops and Establishments Act, which was disposed of by the Additional Commissioner for Workmen's Compensation by the order referred to above. Before the Additional Commissioner, a preliminary point was raised on behalf of the Management that the appellant was not a person, to whom the provisions of the Act applied, because, he fell within the category described in clause (*a*) of section 4 (1) of the Act, namely, "persons employed in any establishment in a position of management". This plea was accepted by the Additional Commissioner. He found, on an examination of the evidence adduced by the parties, that the appellant was employed in a position of management. On this finding, the Additional Commissioner had no other alternative but to dismiss the appeal preferred by the appellant before us. It is to quash this order that the Writ Petition, out of which this appeal arises, was filed.

Neither before the learned Judge, Rajagopala Ayyangar, J., nor before us, the finding of the Additional Commissioner that the appellant was employed in a position of management was challenged. The only ground on which the order of the Additional Commissioner was sought to be quashed was that he had no jurisdiction to determine the issue, because, under section 51 of the Act, the question could be decided only by the Commissioner of Labour. The learned Judge held that the ground was not sustainable, and that the jurisdiction of the Additional Commissioner to determine the status of the appellant, that is, whether he fell within section 4 (1) (*a*) of the Act, was not ousted by section 51 of the Act. Hence this appeal.

The only question which falls for decision in this case turns on the interpretation of section 51 of the Act, which runs as follows :—

> "If any question arises whether all or any of the provisions of this Act apply to an establishment or to a person employed therein or whether section 50 applies to any case or not, it shall be decided by the Commissioner of Labour and his decision therein shall be final and shall not be liable to be questioned in any Court of law".

It was contended by learned counsel for the appellant that if a question arises as to whether all or any of the provisions of the Act applied to an establishment or to a person employed therein, before any Tribunal or Court, such a question can be decided only by the Commissioner of Labour, because he was the only person or Tribunal who was competent to determine the question. Learned counsel had perforce to follow this argument to its logical result that the moment such a question was raised, there should be a suspension of further proceedings before any other Tribunal, or Court, and the question should be referred for decision to the Commissioner of Labour. Apart from the language of the section itself, which we shall deal with later on, the appellant's learned counsel relied on two decisions, namely, *Pasmore* v. *Oswald Twistle Urban Council*[1], and *Parry & Co.* v. *Commissioner, Employees' Association*[2]. In the former case, the House of Lords applied the well-established principle of law, which was thus enunciated by Lord Tenterden in 1831 :—

> "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

1. L.R. (1898) A.C. 387.
2. (1952) 1 M.L.J. (S.C.) 813 : 1952 S.C.R. 519 : 1952 S.C.J. 275.

The actual decision in the case was that the duty of a local authority under the Public Health Act, 1875, to make such sewers as may by necessary for effectually draining their district for the purpose of that Act, cannot be enforced by an action for *mandamus* brought by a private person, but the only remedy for neglect of the duty was that given by section 299 of the Act, a complaint to the Local Government Board. There is no scope for the application of this principle to the case before us. The question before us is whether the particular Tribunal whose order is sought to be quashed had or had not the jurisdiction to decide whether an employee fell within or outside the provisions of the Shops and Establishments Act.

The other decision relied on is that of the Supreme Court in *Parry & Co.* v. *Commissioner, Employees' Association*[1]. Learned counsel for the appellant conceded that the decision in that case as such has no bearing on the present case; but he relied on the following observation of Mukherjea, J., who delivered the Judgment of the Court :—

"Under section 51 of the Madras Shops and Establishments Act, the Labour Commissioner is the only proper and competent authority to determine the questions referred to it in that section ; and there is an express provision in it that the decision of the Labour Commissioner shall be final and not liable to be challlenged in any Court of law".

This observation should be understood in the context and not divorced from it. All that the learned Judges decided in that case is clear from the following further observations of the learned Judge :—

"It was the respondent who took the matter before the Labour Commissioner in the present case and invited his decision upon the questions raised in the petition. The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within the jurisdiction of the Labour Commissioner to decide and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus, there was absolutely no ground here which would justify a superior Court in issuing a writ of *certiorari* for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions."

In the case before the Supreme Court, there was no matter pending enquiry before any judicial or quasi-judicial tribunal or Court. There was a petition directly filed before the Commissioner of Labour to decide certain questions, which related to the rights and privileges of the employees of the Company who filed the petition. This decision is therefore no authority in support of the extreme contention on behalf of the appellant that, whenever and wherever a question is raised as to the applicability of the Act or any of the provisions to any employee or establishment such question should be forthwith referred to the Commissioner of Labour for his decision.

There is, on the other hand, a direct decision on the point by a learned Judge of this Court, Ramaswami, J., in In re *Sankaranarayana*[2]. That case arose out of a prosecution under the Madras Shops and Establishments Act for contravention of certain provisions of the Act and the Rules made thereunder. The Additional First Class Magistrate, Kollegal, found the accused guilty who thereupon filed a criminal revision case in this Court. One of the points urged was that the Act did not apply to the petitioner who was managing an out-agency of a railway and that it was only the Commissioner of Labour who could decide the question whether the Act applied or not under section 51 of the Act and the Magistrate was not competent to decide that question. Ramaswami, J., overruled this contention. He explained the scope of the application of section 51 of the Act thus :—

"Section 51 of the Act is a miscellaneous departmental provision which states that when there is a dispute about the application of one or more of the provisions of the Act to a particular establishment or particular individual, the authority who will have to decide that matter will be Labour Commissioner and that his decision thereon shall be final. It only means that the decision is final in so far as appeals in the department are concerned and not that it takes away the powers of the Court to

1. (1952) 1 M.L.J. (S.C.) 813 : 1952 S.C.R. 519 : 1952 S.C.J. 275.
2. (1952) 2 M.L.J. 857.

decide whether in the particular circumstances of the case the Madras Shops and Establishments Act applied or not. I am unable to accept the contention that the decision of the Commissioner of Labour is a prerequisite for a Magistrate to find out whether the offence for which the accused has been charged before him has been committed by him or not. This miscellaneous provision in section 51 of the Act is merely for the removal of difficulties in deciding certain questions in so far as the department is concerned and would not stand in the way of the Magistrate at all."

With respect to the learned Judge, we are in entire agreement with his reasoning and conclusion.

Coming to the language of the section itself, it is true that, *prima facie*, it is very wide. But there are certain singular omissions which are not without significance. Though the section opens with the words " If any question arises ", these words are not followed up by words like " before any Court or Tribunal ". There is nothing in the section which makes it imperative on a Court or a Tribunal, before which a question as to the applicability of the Act is raised, to stay further proceedings before it and to refer the question to the Commissioner of Labour for his decision. In recent agrarian legislation, there are provisions which make such a course imperative. But, in section 51, there is no provision for a compulsory reference. This construction of section 51 does not make it purposeless. There are several provisions in the Act dealing with different subjects like the hours of work, holidays, leave, health and safety of the employees, and wages. There may be occasions when a Management,—or, it may be the employee—consider it necessary to obtain an authoritative ruling on the application of such provisions. But then there is no provision for such questions being decided by any other tribunal. The jurisdiction of the Commissioner of Labour could, in such matters, be invoked. We are clearly of opinion that section 51 does not have the effect of interfering with the functions and jurisdiction of the civil Courts including this Court and judicial and quasi-judicial tribunals. We agree with the learned Judge that the order of the Additional Commissioner for Workmen's Compensation was not without jurisdiction. The appellant is, therefore, not entitled to have the order quashed.

There is one other ground, on which we think the appellant is not entitled to any relief from this Court under Article 226 of the Constitution. Admittedly, this objection was not taken before the Additional Commissioner for Workmen's Compensation. If he had taken it, the Additional Commissioner might well have referred the matter to the Commissioner of Labour, assuming that this is the proper course. Instead, the appellant invited the Additional Commissioner to go into the question raised and was prepared to take his decision. Now that the decision has gone against him, he cannot be heard to say that the Additional Commissioner acted without jurisdiction.

In the result, the appeal fails and is dismissed. There will be no order as to costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Nallakaruppan Chettiar .. *Petitioner**

v.

Subbiah Thevar .. *Respondent.*

Cattle Trespass Act (I of 1871), section 10—Scope of—'Cultivator or occupier'—Meaning of.

Section 10 of the Cattle Trespass Act contemplates certain sets of persons who alone are authorised to seize cattle trespassing under certain circumstances. One of them is the cultivator or occupier of the land on which the cattle trespasses. The term ' cultivator ' includes not only the person who actually toils on the land on his own account but also the owner of the land who gets it cultivated through his farm servant or hired labour. The workable test in the interpretation of the terms ' cultivator ' or ' occupier ' appears to be whether or not the person who claims to have legally seized the

* Crl.R.C. No. 716 of 1959. 11th February, 1960.
(Crl.R.P. No. 697 of 1959). (22nd Magha, 1881, Saka).

cattle or caused them to be seized can maintain that he has suffered any loss or damage as the very scheme of the Act is based on the concept of damage caused by the trespassing cattle and consequent loss to cultivators.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the District Magistrate (J), Tiruchirapalli, dated 28th February, 1959 and made in C.A. No. 76 of 1959 (C.C. No. 37 of 1959, S.M., Tirumayam).

R. Santanam, for Petitioner.

M. S. Sethu, for Respondent.

M. Narayanamurthi, for the Public Prosecutor (*P. S. Kailasam*), for the State.

The Court made the following

ORDER.—This is a revision preferred against the conviction and sentence by the learned Sub-Magistrate of Tirumayam in C.C. No. 37 of 1959, confirmed by the learned District Magistrate of Tiruchirapalli, in C.A. No. 76 of 1959.

The short facts are. On 25th October, 1958, at 10 A.M. a bull and cow belonging to the accused were grazing on the fields belonging to the complainant's master Sethu Raman Chettiar of Pasumadam. P. W. 4 caught them and was taking them to the pound. While he was going near the Vachakasalai the accused who is the owner of the cattle asked him not to take them to the pound. But P.W. 4 persisted and stated that they had damaged his master's crops and if the accused wanted the cattle to be not taken to the pound he should approach his master. The accused became irritated and beat P.W. 4 with his chappals and rescued the cattle forcibly from the hold of P.W. 4. Thereupon P. W. 4 informed his master and a complaint was filed.

The case for the accused was one of total denial of the commission of the offence and that he had been falsely impleaded on account of enmity.

Both the Courts below found the accused guilty under both the charges, namely, under the Cattle Trespass Act, and also for beating P. W. 4 with chappals and awarded a fine of Rs. 250 under section 24 of the Cattle Trespass Act and Rs. 250 under section 355, Indian Penal Code, with appropriate default sentences.

I am bound by the concurrent findings of fact based on relevant and adequate evidence.

The interesting point of law taken by the learned advocate Mr. R. Santanam is whether this P. W. 4 can be considered to be a *cultivator* or *occupier* within the meaning of section 10 of the Cattle Trespass Act. (For an up-to-date discussion of section 10, *see* Cattle Trespass Act (Wadhwa & Co.), (1958) Ch. 3, page 3 and following and the A.I.R. Manual (Civil and Criminal), 2nd Edition (1960), Vol. I, pages 863 and 864.

Section 10 contemplates certain sets of persons as those who alone are authorised to seize cattle under certain circumstances. The first of them is the cultivator of the land. Though there is apparently no difficulty in the term "cultivator", in actual application it may raise some questions of importance. Obviously the term includes not only the person who actually toils on the land on his own account but also the owner of the land who gets it cultivated through his farm servant or daily labourer. In other words, though the meaning of the word "cultivator" in the section is covered by little authority, the only workable test in the interpretation of the word appears to be whether or not the person, who claims to have legally seized the cattle or caused them to be seized, by virtue of his position as a cultivator can maintain that he has directly or indirectly suffered the loss caused by the damage. In fact, the very scheme of the Act seems to be based on the concept of damage caused by the trespassing cattle and consequent loss to cultivators.

The occupier of any land is one of the persons entitled to seize cattle or cause them to be seized. The use of the expression " cultivator or occupier " indicates that the occupier of any land is not necessarily a cultivator. Land other than cultivable land seems, therefore, to have been contemplated. This is further strengthened by the use of the expression " crop or produce ". Grass standing on land is valuable produce of land for conserving which expenses may be incurred. A person who is in occupation of grazing land is its occupier within the meaning of this section, and he is entitled to seize cattle trespassing on such land and doing damage thereon. (For an exhaustive citation of the relevant cases see the most welcome Second 1960 edition of the A.I.R. Manual, Vol. I, referring to *Bikram Mahton* v. *Emperor*[1], *Budho* v. *Emperor*[2], *Saudagar*, In re[3], *Manick Chandra Roy* v. *Ismail Kalu*[4].

Therefore, we have first of all to determine the status of P.W. 4 and fortunately for us it was elicited in the cross-examination of P. W. 4 that he is the pannayal of Sethu Raman Chettiar, and is also engaged in watching his fields. Therefore he may legitimately be described as the servant or watchman of the owner of this land.

There are three decided cases which throw light on this matter, namely, that such a person can also be considered to be a person inculded in the set of persons authorised to seize cattle under the section.

Seizure of cattle by watchman or servant under general instructions from the cultivator or occupier is legal. If the watchman or servant seizes cattle under such instructions, the cultivator or occupier causes them to be seized within the meaning of the section : In re *Subbaraya Pillai*[5]. Under section 10 of the Act, a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize the cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing: *K. Dusadh* v. *Sarati Dusadh*[6]. A private forest in a Zamindari was treated as a reserve forest for certain purposes by the application of section 26 and section 32 of the Madras Forest Act. When the Forest Range Officer belonging to the Zamin and his watchers were driving cattle found grazing in the forest the accused rescued the cattle. It was held that the Zamindar was the occupier of the forest within section 10 and the persons appointed by the Zamindar to be in charge of the forest were entitled to seize the cattle, and, therefore, the accused were guilty under section 24. Where cattle are found grazing on land in the occupation of its owner or occupier, it is not necessary that the owner or occupier himself must physically seize and take the cattle to the pound: (*Sathirnalan* v. *Rex*[7].)

The net result of this analysis is that the accused has been rightly convicted under section 24 of the Cattle Trespass Act. As for beating with chappals both the Courts below found the allegation to be true and therefore the conviction under section 355, Indian Penal Code, is also correct.

In regard to the sentence the learned advocate, Mr. Santhanam, presses that this is a case where considerable reduction should be made in regard to the punishment, if I come to the conclusion that the accused has been rightly convicted under section 24 of the Cattle Trespass Act and section 355, Indian Penal Code. There is much force in what he says. Having regard to the circumstances I consider that punishment under section 24 of the Cattle Trespass Act may be reduced to a fine of Rs. 50 and the punishment under section 355, Indian Penal Code, may be reduced to a fine of Rs. 150. Out of the fine amounts collected a sum of Rs. 100 will be paid as compensation to P.W. 4. The balance of the fine amount if any collected will be refunded to the revision petitioner.

This revision is disposed of accordingly.

R.M. ——— *Sentences reduced.*

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1. A.I.R. 1947 Pat. 174 : 47 Cr.L.J. 986.
2. A.I.R. 1943 Sind 152 : 44 Cr.L.J. 761.
3. A.I.R. 1916 Lah. 281 : 17 Cr.L.J. 63.
4. A.I.R. 1919 Cal. 93 : 20 Cr.L.J. 398.
5. (1915) 16 Cr.L.J. 772.
6. A.I.R. 1922 Pat. 317.
7. 1948 M.W.N. 407.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Bhagwandas Goenka .. *Appellant**

v.

Union of India, by Mr. G. Subramaniam, Ministry of Finance, New Delhi .. *Respondent.*

Constitution of India (1950), *Article* 20 (3)—*Scope*—'*Accused of any offence*'—*Meaning*—*Applies to proceedings of a criminal nature before a Court of law or judicial tribunal.*

Foreign Exchange Regulation Act (*VII of* 1947), *section* 19 (2)—*Requiring information about foreign exchange*—*Article* 20 (3) *of the Constitution*—*Applicability.*

The words 'accused of any offence' in Article 20 (3) of the Constitution indicate an accusation made in a criminal prosecution before the Court of law or a judicial tribunal where a person is charged with having committed an act which is punishable under the Indian Penal Code or any special or local law. In construing Article 20 of the Constitution the article has to be read as a whole and not to divorce clause (3) of that article from the rest of it.

The Reserve Bank of India had merely some information about dollars acquired by a person in the United States in addition to the foreign exchange specifically granted to him. In order to ascertain this, under section 19 (2) of Act VII of 1947 the Bank issued a number of directions to the person, at several stages, the questions themselves being dependant upon the explanations furnished by the person and fashioned in order to test the truth of those explanations. No accusation that he has committed any offence is levelled against the person. Assuming that Article 20 (3) applies to all kinds of proceedings, such person cannot be held to be a person accused of any offence within the scope of Article 20 (3) in order to render his testimony inadmissible in evidence.

Appeals against the Judgments of the Chief Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras, in Cases Nos. 6910 and 6911 of the Calendar for 1956.

The Advocate-General (*V. K. Thiruvenkatachari*) and *V.P. Raman*, for Appellant.

The Solicitor-General of India (*C. K. Daphtari*) for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

C. K. Venkatanarasimhan, for Respondent.

The Court delivered the following Judgments :

Anantanarayanan, J.—These are two connected appeals instituted by Bhagwandas Goenka, against the convictions and sentences of the learned Chief Presidency Magistrate in C.C. Nos. 6910 and 6911 of 1956, convicting this appellant under section 4 (3) read with section 23, and sections 4 (1) and 9 read with Notification No. 12 (13) F-1/47 dated 25th March, 1947 and section 23 respectively of the Foreign Exchange Regulation Act, 1947, and sentencing him to pay a fine of Rs. 1,000 upon each charge. The cases were tried and dealt with by the learned Magistrate separately, but, as a matter of fact, the transactions are inter-related and have to be viewed as a whole. They mainly occurred within the period 26th July, 1951 and 14th September, 1951, when the appellant visited the United States along with his wife Saroj Goenka, who was a co-accused in the lower Court in C.C. No. 6911 of 1956, but was discharged. Before proceeding into the facts, it will be convenient to set out the charges, and also to scrutinise, in this context itself, the relevant provisions of the Foreign Exchange Regulation Act which the appellant is supposed to have infringed.

In C.C. No. 6910 of 1956 in the Court below, the charge against the appellant was that he failed to utilise a portion of the foreign exchange allowed to him for his visit to the United States, namely, 500 dollars out of the 1,800 dollars, sanctioned, and that, instead of selling or transferring without delay this unutilised sum to an authorised dealer in foreign exchange in India, he deposited this amount of 500 dol-

* Crl. Appeals Nos. 294 and 295 of 1959. 12th February, 1960. (23rd Magha, 1881, Saka).

lars in the joint account of himself and his wife with the National City Bank of New York, and thus committed an offence under section 4 (3) of the Foreign Exchange Regulation Act, read with section 23 of the Act. In C.C. No. 6911 of 1956, the charge against the appellant was that, during his visit to the United States, between 26th July, 1951 and 14th September, 1951 (on or about 7th September, 1951), he borrowed a sum of 4,000 dollars from a person other than an authorised dealer in foreign exchange, which he deposited in the joint account of himself and his wife, and thus contravened section 4 (1) of the Foreign Exchange Regulation Act. The second charge was that he failed to surrender the aforesaid sum of 4000 dollars to an authorised dealer in foreign exchange in India for conversion into Indian currency, within the priod of one month from the date of acquisition, and thereby contravened the provisions of section 9 of the Foreign Exchange Regulation Act read with Notification No. 12 (13) F-1/47, dated 25th March, 1947, both these contraventions being punishable under secion 23 of the Act.

Section 4 (1) of the Foreign Exchange Regulation Act (VII of 1947) runs as follows :—

> " Except with the previous general or special permission of the Reserve Bank no person other than an authorised dealer shall in the States, and no person resident in the States other than an authorised dealer shall outside the States, buy or borrow from, or sell or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange ".

Similarly, section 4 (3) of the same Act is to the following effect :

> " Where any foreign exchange is acquired by any person other than an authorised dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose, or as the case may be, fail to comply with any condition to which the permission granted to him is subject and where any foreign exchange so acquired cannot be so used or, as the case may be, the conditions cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer."

Section 9 of the Act, which is titled 'Acquisition by Central Government of Foreign Exchange', runs as follows :—

> " The Central Government may, by notification in the Official Gazette, order every person in or resident in, the States (*a*) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person, as the Reserve Bank may authorise for the purpose at such price as the Central Government may fix ".

We are not concerned with the rest of this section, inclusive of the two provisos which relate to certain exemptions. But we may note that, originally, section 9 (*a*) ran as "who owns such foreign exchange", and the words "owns or holds" were substituted by Act XXXIX of 1957. We may also note that the notification in the Official Gazette referred to in the section is Notification No. 12 (13) F-1/47, dated 25th March, 1947, set forth in the charge. The indisputable effect of this is that, after the date of the Notification, any person owning or holding such foreign exchange, has to surrender the same to an authorised dealer in foreign exchange in India for conversion into Indian currency within a period of one month from the date of acquisition.

Section 23 is the punitive section under the Act and, as amended, section 23 (*a*) runs as follows :—

> " If any person contravenes the provisions of section 4, section 5, section 9 or sub-section (2) of section 12 or of any rule, direction or order made thereunder, he shall
>
> (*a*) be liable to such penalty not exceeding three times the value of the foreign exchange....
>
> (*b*) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both ".

In this context itself, we might also note three other relevant provisions. Under section 19 (2), the Reserve Bank is clothed with the power, to require any person, by order in writing, to furnish, or to obtain and furnish, to the Bank with such information, book or other document as may be required. Under section 22 of the Act,

it is specified that no person should give any information or make any statement which he knows or has reasonable cause to believe to be false, or not true in any material particular, when complying with any order or direction under section 19. Failure to comply with such order or direction is made specifically punishable under section 23 (1-A) (*a*) of the Act. In brief, the directives issued by the Reserve Bank under section 19 are, undeniably, interrogatories or demands for submission of documentary material, which have to be complied with *in terrorem*, without concealment or misrepresentation. Lastly, we might refer to section 24 (2) of the Act, which states that where a person is prosecuted for contravening the provisions of section 4 (3) which we have earlier set forth, the burden of proving that the foreign exchange acquired by such person was used for the purpose for which permission to acquire it was granted lies upon him.

We are now in a position to examine the facts of the record, in a clearer manner. In spite of the seemingly confused and intricate pattern of those facts, we shall see that the matter is really simple, as far as the gravamen of the charges is concerned. The learned Solicitor-General for the State has attempted to argue that the discrepancies, the irreconcilable statements and inexplicable lacunae in proof of facts appearing in the version of the accused and in the defence demonstrate beyond doubt that the accused has attempted to evade and conceal the truth. But, in fairness to the appellant, the matter is best approached from the point of view of his own evidence and version, and the material bearing upon this. It will then be seen that, upon two of the charges at least, the appellant has no defence in fact, his true defence being one of legal interpretation. We are here setting forth only the admitted facts, and the version of the appellant, and we shall later see how far that version is supported upon the probabilities. We shall also examine how far, assuming that the version contains elements of substantial truth, it can suffice as an answer to the specific charges.

The facts are that the appellant visited the United States, along with his wife, on 26th July, 1951, being himself a Director of the Express Newspapers Limited, and the trip clearly being one which combined business with pleasure. Excluding the cost of passages, an amount of 1,800 dollars of foreign exchange was sanctioned as far as the appellant was concerned. There was no such sanction for his wife, the American Embassy granting the visa in her respect, upon being satisfied that certain friends in the United States would meet her actual expenses. The appellant and his wife were in the United States between 26th July, 1951 and 14th September, 1951, on which latter date they left America. The version of the appellant is that, while in that country, he decided to purchase a Splicer Roll Winder from Messrs. Cameron Machine Company for the use of Express Newspapers Limited. The price was 9,000 dollars, and, since the machine could also be sold at option to an Australian Firm for which it had been originally reserved, the Cameron Machine Company and Mr. Farrel insisted upon cash payment or a letter of credit in the Company's favour. The appellant cabled to the Madras Office about the transaction, and the Madras Office applied for a licence and obtained it, but there was delay in the despatch of the letter of credit for 9,000 dollars, and hence at least 50 per cent. of the amount had to be kept as earnest money with the Cameron Machine Company. From this point of time onwards, there are divergent versions. According to one version of the appellant, (his letter in response to the directive Exhibit P-6, which is Exhibit P-7) Mr. Tom Beck, who was the President of a large publishing concern, a multimillionaire and the host of the appellant and his wife, agreed to help him with 4,000 dollars which he, (appellant) could place as deposit with the Agent of the Cameron Machine Company, until the letter of credit was received. According to the oral evidence of the appellant (as D.W. 1 under section 342 (*a*), Criminal Procedure Code,) this amount of 4,000 dollars was really given by Mr. Tom Beck as an hospitality gift, the understanding being that appellant and his wife could spend what they wanted out of the moneys recognising a moral obligation to return the unexpended money. However this might be, this amount of 4,000 dollars was, according to the appellant, deposited with Mr. Farrel, Agent of the Cameron Machine Company, as earnest money.

In the meanwhile, according to the appellant, Mr. Vishwa Bandhu Gupta (writer of Exhibit P-27) from India, learnt that the appellant was in need of this sum to purchase the mahine, and advised one Mr. Leeclark to advance a sum of 4,000 dollars to the appellant. The appellant claims that he did not know Mr. Leeclark personally, but admits that the amount of 4,000 dollars was received from Mr. Leeclark and that he deposited it in the joint names of himself and his wife in the National City Bank of New York. According to the appellant, he treated this amount as a substitute for the hospitality gift of 4,000 dollars made by Mr. Tom Beck, and issued several cheques from this sum. We may here state that the accounts of the National City Bank (Exhibit P-8 series) establish beyond doubt that one sum of 4,000 dollars was credited in the account of the appellant on 7th September, 1951. It is also not in dispute that subsequently, the letter of credit was received from India, and that Mr Leeclark was repaid his temporary loan of 4,000 dollars. According to Vishwa Bandhu Gupta (Exhibit P-27), it was the appellant who repaid this sum, and he specifically states "What I understand is that Mr. Leeclark was reimbursed by Mr. Goenka himself". After stating on more than one occasion that the amount was given to him as a loan, the appellant states "I was under no obligation to repay 4,000 dollars to Mr. Leeclark when the amount was placed at my disposal". But it is crystal-clear from the letter of Mr. Farrell dated 22nd June, 1953 (Exhibit D-1), proved in defence, that Mr. Leeclark was repaid after the letter of credit was received.

Upon this part of the transactions, what the learned Solicitor-General urged is this. He admits that such a Splicer Roll Winder machine was acquired for Express Newspapers Limited, on the initiative of the appellant, in the United States. He concedes that a licence was duly obtained, a letter of credit obtained later, and that the cost of the machine (9,000 dollars) was paid. It is the case for the prosecution, again, that a sum of 4,000 dollars was acquired by the appellant from Mr. Leeclark as a loan or advance, and put into his account. It is the common case that this amount was ultimately repaid; the appellant does not pretend, and has not claimed at any stage, that Mr. Leeclark made a gift of 4,000 dollars, expecting no repayment. According to the prosecution, this is sufficient to show that the appellant contravened the Act by obtaining this temporary advance of 4,000 dollars, which he appears to have used for his additional private expenses in America. But the prosecution claims that, though Mr. Tom Beck might have truly existed, and might even have been a friend of the appellant's father, as the appellant claims, the entire story of the 'hospitality gift' of a further 4,000 dollars is a myth. It is opposed to the probabilities, and it is totally unproved by the kind of evidence which we might reasonably expect, if that story had any vestige of truth.

Regarding the charge in C.A. No. 294 of 1959, the case of the appellant is this. He admits that Exhibit P-2 series are travellers' cheques issued by Thomas Cook and Son for 500 dollars, forming part of the 1,800 dollars sanctioned to the appellant. He further admits that he did not utilise these cheques during his stay in America or Canada. On the contrary, he took them with him to Switzerland, and from that country he deposited them in his bank account in the National City Bank, New York, by negotiating this through a Bank at Switzerland. The appellant actually returned to India not bringing this sum with him, on 10th October, 1951, while the amount was credited in the New York Bank on 17th October, 1951. But the reply of the appellant to the charge under section 4 (3) set forth already is this. Though 1,800 dollars alone had been sanctioned for his expenses, he had actually spent much more, nearly a total sum of 3,500 dollars. There are at least two cheques in the account totalling 1995.73 dollars respectively cashed on 18th September, 1951 and 27th Setember, 1951, which themselves exceed 1,800 dollars, though the difficulty here is that the 'paid' cheques were never produced. However this might be, the defence of the appellant is that he cannot be taxed with having retained 500 dollars out of the foreign exchange granted to him, without due surrender, when he had actually spent more than 1,800 dollars. The gravamen of this charge, according to the learned Advocate-General for the appellant, merely amounts to the highly technical argument that the appellant retained this amount *in specie*, while he could easily have disposed of these particular travellers' cheques earlier. But, here again, the great

difficulty is in believing the version of the appellant upon the probabilities. As the learned Solicitor-General stresses, this explanation for the retention of the 500 dollars, and deposit of this sum in the New York Bank, is inseparable from the account given of the 'hospitality gift' by Mr. Tom Beck. It is admitted for the appellant that this 500 dollars formed part of 2,300 dollars which had to be returned to Mr. Tom Beck, at least as a moral obligation, deducting the expended amount. But did the appellant return this sum at all? The case of the appellant is that he sent a cheque for 2,300 dollars to his brother-in-law Sashi Chand Jain and this is very probably true. But there is not an iota of evidence to prove or probabilise the theory that this sum was intended for Mr. Tom Beck at all. Mr. Tom Beck died, unfortunately for the appellant, sometime during the pendency of the proceedings. The attempted explanation is that Mr. Sashi Chand Jain, the brother-in-law of the appellant, who has not been called to give evidence, has not so far been able to ascertain or to contact the true heirs of the deceased multi-millionaire. The learned Solicitor-General argues, it must be conceded with great plausibility, that neither the sum of 500 dollars nor the larger sum of 2,300 dollars of which it should have been intended to form a part, was ever meant in reality to reach Mr. Tom Beck or his heirs, the story of the 'hospitality gift', or the alternate version of an advance by Mr. Tom Beck for the purchase of machinery being quite mythical. In other words, the learned Solicitor-General stresses that this is merely a deliberate sequestration of certain foreign exchange resources.

We are unable to deny the force of the argument that, had the story relating to Mr. Tom Beck been true, we should have expected very different material in support of it. Not a single cheque, letter or memorandum is forthcoming to probabilise either the story bringing in Mr. Tom Beck into the picture of these transactions, or the theory that Mr. Leeclark's advance of 4,000 dollars was actually meant for the purchase of the machine. With regard to the latter part of the advance, at least, there is the letter from Mr. Farrell, Exhibit D-1. But with regard to the part played by Mr. Tom Beck, there is no support in the evidence, excepting the uncorroborated version of the appellant, who has also put forward contradictory versions at different stages.

But, however, this might be, we may take it as indisputable that Mr. Leeclark did advance a sum of 4,000 dollars, obviously not as a gift, and that this amount was placed by the appellant in his American Banking account, and utilised by him. As we observed earlier, the appellant, definitely concedes that he used this amount. But, in this case, it is very difficult to see how the appellant has any answer to the charges under section 4 (1) and under section 9, upon this aspect, in C. C. No. 6911 of 1956. These may be technical offences, in a certain sense, and it may be that the appellant was not guilty of any moral turpitude in obtaining such accommodation; quite probably he found that the sum of 1,800 dollars was insufficient to meet the expenses and purchases of himself and his wife. Admittedly, the appellant did not surrender this sum to an authorised dealer in foreign exchange in India for conversion into Indian currency within a month of the acquisiton, under section 9 read with the Notification earlier referred to. What is the answer to these charges?

The answer attempted by the learned Advocate-General for the appellant is one that can hardly be termed convincing. Upon section 4 (1), in the strict sense, and as far as we have been able to follow the arguments of the learned Advocate-General on this part of the case, the answer seems to be that, formally, this does not fall within the scope of the words "borrow from" employed in section 4 (1) of the Act. The learned Advocate-General stresses that section 4 (1) does not employ a general or comprehensive word such as "to acquire". Obviously, gifts *per se* are not excluded, since the intendment of the section and of the Act itself is not to allow any depletion of rupee resources against the foreign exchange, particularly in dollars. But since Mr. Leeclark was admittedly repaid, and never intended his advance to be a gift, the argument does not carry us far. But the further argument is that the words "to borrow" necessarily imply a 'lender' and a 'borrower', and a jural relationship resulting from the loan. The learned Advocate-General stresses the dictum of

Buckley, J., in *Re Southern Brazilian Rio Grande Do Sul Ry. Co.*[1], to the effect that "borrowing necessarily implies repayment at some time, and under some circumstances". It is argued upon the material in record, that the advance was made entirely at the instance of Mr. Vishwa Bandhu Gupta, and upon his initiative (Exhibit P-27). Hence, the borrower could only be Mr. Vishwa Bandhu Gupta, since the appellant did not known Mr. Leeclark at all, or, at the worst, the borrower could only be the jural entity of the Express Newspapers, Limited. We consider that this argument is patently fallacious, and that it ignores the realities of the situation. The appellant, as a Director of the Express Newspapers, Limited, negotiated for the purchase of machinery on its behalf, and required this amount either for himself or for the machinery. Mr. Viswa Bandhu Gupta explicitly states :

> " The payment was not made on my behalf. The payment was given to Mr. Goenka as he was in need of money to purchase certain machinery in America. No question of my reimbursement to Mr. Goenka arises. What I understand is that Mr. Leeclark was reimbursed by Mr. Goenka himself". [Exhibit P-27 (iv) (*b*).]

Not merely this. The appellant has stated, again and again, that he was accommodated with a loan, in this respect. He stated in Exhibit P-7 :—

> " Mr. Leeclark. . . . at the intance of Mr. Vishwa Bandhu Gupta loaned me 4,000 dollars while I was in the United States of America in 1951 ".

In his evidence, the appellant stated (D.W. 1) the word ' loaned ' has been loosely used. But, in cross-examination he stated :

> " The statement that at the instance of Vishwa Bandhu Gupta his friend Mr. Leeclark loaned me 4,000 dollars in 1951 while I was in United States of America is correct. I used the word ' loaned ' in a loose sense ".

We are certainly conscious of the fact that, upon a technical point of interpretation, we cannot use an admission of this kind against the appellant, ignoring what could be said for an opposite view of the transaction. (vide *K. Dhanjibhai* v. *The State of Bombay*[2]). But we are quite unable to see how the appellant, an educated man and a businessman, is not to be taken at the face value of his assertion that he did obtain this accommodation from Mr. Leeclark, though Mr. Viswa Bandhu Gupta might have obliged the appellant by helping the appellant to secure the loan. The fact that *A* writes to *B* to grant a loan to *C* and that *B* grants the loan, depending upon the assurance of *A*, does not make the transaction anytheless a borrowing as between *B* and *C*. Upon this charge, therefore, there is really no answer.

Equally, we are quite unable to see that the appellant has any answer with reference to the charge under section 9 (*a*) read with the relevant notification and section 23 of the Act. The argument of the learned Advocate-General here is that we must look, in these matters, to the purpose of the enactment. The enactment seeks to preserve rupee resources against foreign exchange in dollars, and the present facts did not involve any real depletion of those resources. The learned Advocate-General emphasised that, otherwise, the strict enforcement of such technical provisions would constitute a grave hardship, particularly to Indians abroad who might have to obtain foreign exchange for maintaining themselves, and for other essential purposes. But we do not think that we would be justified in interpreting and enforcing an Act of this nature, not with reference to its clear and explicit language, and to the situation of facts to which such language applies, but with refrence to some other subjective test of the degree to which we think that the real intention behind the Act has been frustrated or otherwise. The learned Solicitor-General rightly stresses that there are very many adequate safeguards in the Act, in the shape of Provisos, particularly the Proviso 5 (2) (*b*) exempting salaries or payments for services abroad, etc. The further argument of the learned Advocate-General is that section 9 can only apply to " every person in, or resident in, the States ". This is sought to be interpreted as applicable to an Indian citizen like the appellant, only while he actually resides in India. We have carefully considered this interpretation, and we are quite unable to sustain it. On the contrary, the distinction between ' in ' and ' resident in '

1. L.R. (1905) 2 Ch. 78.
2. (1955) S.C.J. 150 : (1955) 1 S.C.R. 887.

clearly implies that what is intended is a description of quality, namely, of ordinarily continuous residence, and that a purely temporary stay abroad will not make the section less applicable. This part of the section will therefore apply to all persons who can be justifiably described as permanent residents of India though they might be abroad at the particular time of a transaction, while the earlier part will apply to those who are *in* the country, whatever might be the quality of their permanent residence. It is important to note here that, under section 1 (2), the Act specifically applies " to all citizens of India outside India ". Since the foreign exchange acquired by the appellant in the United States by way of accommodation, whether 4,000 dollars or 8,000 dollars, inclusive of another 4,000 dollars obtained from Mr. Tom Beck, was never surrendered in any part, an offence as defined under section 9 is technically complete and proved.

The last charge relates to the mater of 500 dollars already referred to. Here, we would not uphold the conviction upon this charge, if it had merely rested upon a highly technical view that the appellant retained and did not surrender these particular travellers' cheques *in specie*. But, as we understand the facts, the appellant seems to have retained not merely these 500 dollars, but an actual total sum of 2,300 dollars, now in the possession of his brother-in-law Mr. Sashi Chand Jain. There is absolutely nothing to prove that these dollars related to Mr. Tom Beck at all, or were genuinely intended for repayment to that individual. The conclusion is irresistible that the appellant has sequestered 500 dollars out of the foreign exchange granted to him, in addition to obtaining dollars abroad which he has never accounted for. The charge must be held fully proved.

Before passing on to the point of law argued in these appeals, which is of significance as it relates to a fundamental right guaranteed under the Constitution, and which deserves to be separately dealt with, we desire to notice two other minor points urged for the appellant, upon the question of sanction. Here, the learned Solicitor-General has legitimately urged that these points were never taken in the trial Court, nor even specified in the memoranda of appeals. They are highly technical, and had they been urged at the trial, or at any earlier stage, the prosecution might well have been able to meet them by adducing the necessary particulars from official witnesses examined in the case. As regards the sanction proved by Mr. R. P. Capoor (P.W. 3) the argument is that this gentleman, who is an Under-Secretary in the Ministry of Finance, might not be a ' Finance Officer ' within the scope of paragraph 5 of S. R. O. No. 167 (Ex. P-43). We have no reason to assume that he is not a ' Finance Officer ' who is thereby competent to sign the necessary order, within the scope of the notification, and he was never asked any question about this. This ground of objection must therefore be rejected. As regards Exhibit P-45 signed by Mr. G. L. Mehta, then Ambassador of India in the United States, though the signature has been proved and is not disputed, the argument is that the exercise of discretion by the Ambassador has not been proved. But *ex facie*, the document bears inherent evidence that the matter was fully considered by the Ambassador before sanction for prosecution was granted. This ground of objection must also therefore fail.

The final ground urged by Mr. V. P. Raman for the appellant is of considerable interest and importance, and may be first formulated as follows : The record of evidence clearly shows, and, indeed, it is indisputable, that certain vital portions of the material in the case consist of the directives of the Reserve Bank under section 19, and the replies thereto. As already noticed by us, these replies certainly fall within the ambit of testimonial compulsion, since the very directives refer to sub-section (1) of section 23 of the Act, rendering a failure to comply with the directive an offence punishable under the Act, and also to section 22 which imposes a similar obligation, upon pain of penalties, to make a true answer. The question is whether these replies are therefore inadmissible in evidence under Article 20 (3) of the Constitution, as incriminating answers furnished by a party in the virtual position of an accused, under testimonial compulsion. The matter also came up before Balakrishna Ayyar, J., in W.P.Nos. 291 and 292 of 1957, arising

out of these very proceedings, and the learned Judge held, after an elaborate survey of the authorities, that the fundamental right was not infringed. The learned Judge also pointed out that a different view, upon facts of this character, would produce surprising results, and render inadmissible the most reliable and significant pieces of evidence obtained even at the stage of an exploration into facts, in order to determine whether an offence or offences had been committed at all. The learned Judge then remarked,

" Article 20 (3) surely could not have been intended to produce such results ".

The argument for the appellant, as advanced by Mr. V. P. Raman, could be expressed in the following form : According to the decision of the Supreme Court in *M. P. Sharma and others* v. *S. Chandra, etc.*[1], though the decision itself is authority for a widely different proposition that a certain seizure of documents under the provisions of sections 94 and 96, Criminal Procedure Code, will not be a compelled production thereof within the meaning of Article 20 (3), the guarantee under Article 20 (3) would be available to persons against whom a First Information Report had been recorded showing them as accused therein. It is urged that, upon parity of reasoning, a similar point of time should be demarcated or fixed with reference to authorities like the Reserve Bank, making enquiries for the purpose of ascertaining whether offences had been committed against Foreign Exchange Regulations. That point of time cannot be the formal institution of a complaint, or a formal decision to institute a complaint. It must relate to the stage of investigation itself, provided that the Reserve Bank authorities are conducting that investigation, placing the concerned individual in the virtual position of an accused. In the present case, the Officer on special duty, Mr. G. Subramaniam (P.W. 1) has shown that the Bank

" received information that the accused unauthorisedly acquired dollars in United States and the bank issued a directive under section 19 (2) ".

It is urged that this is sufficient to clothe this directive, and all subsequent directives, with the character of testimonial compulsion aimed against an accused, rendering his replies inadmissible by virtue of Article 20 (3) of the Constitution.

This argument appears to us, upon careful consideration and analysis, to be totally inadmissible. We may, indeed, dispose of it in a very simple manner, upon the present facts, without proceeding into the larger or more intricate questions of principle involved. The present record clearly shows that not merely was no accusation levelled against the appellant, but that even the Reserve Bank had no justification whatever for holding, or even believing, that the appellant had committed an offence or offences. They had merely some information about dollars acquired by the appellant in the United States, in addition to the foreign exchange specifically granted to him. The Act itself shows that there is a variety of contingencies under which such acquisition may not offend the law. In order to ascertain this, the bank issued a number of directives, at several stages, the questions themselves being dependent upon the explanations furnished by the accused and clearly fashioned in order to test the truth of those explanations. Is it possible to argue that, at that stage, the appellant, even by the most liberal parity of reasoning, was in the virtual position of an accused as named in a Report of First Information. If he ever was in that position, it could only be as and from the date of the notice to show cause why action should not be taken against him under the Act, namely, Exhibit P-33. It is here, for the first time, that the authorities intimate that, as a result of their enquiries, they are satisfied that certain offences had occurred, and that they were proposing to take action. They then state

" However, before doing so, you are hereby given an opportunity to show whether you had any general or special permission ".

This obviously had reference to the burden of proof, as laid down in section 24 of the Act. But, even assuming that Article 20 (3) would be applicable not

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1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : 1954 S.C.R. 1077 (S.C.).

merely to judicial proceedings of any character, but to a multiplicity of situations in which judicial proceedings might be in prospect, it is still impossible to hold that, when certain facts are ascertained, it may be under an obligation to furnish an answer, in order to explore and determine if a person had committed an offence, this exploration itself already places him in the situation of a virtually accused person, and thus renders his explanations inadmissible in evidence. This element of an obligation to furnish replies to certain questions by authorities is present in various enactments, as the learned Chief Presidency Magistrate has himself pointed out. For example: The Indian Income-tax Act (XI of 1922), sections 19-A, 20-A, 21, 22 (2), 22 (4), 38 and 51 (c); the Madras Co-operative Societies Act (VI of 1932), sections 37 (4), 38 (2) (b) and 55; the Madras General Sales Tax Act (IX of 1939), and the Rules framed thereunder, sections 14 (1), 15 (2) (d) and 19 (2) (h) rules 6 (9), 6 (10) and 32; the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), sections 15 and 16; the Muslim Wakfs Act (XXIX of 1954), sections 4 (4) and 41 (1); the Indian Standards Institution (Certification Marks) Act (XXXVI of 1952), sections 9 and 14; the Plantations Labour Act (LXIX of 1951), sections 5 and 36; the Requisitioning and Acquisition of Immovable Property Act (XXX of 1952), sections 13 and 20; the Factories Act (LXIII of 1948), sections 9 (b), 90 (2) and 92; the Forward Contracts Regulation Act (LXXIV of 1952), sections 8 (2), (8) (3), 8 (3) (d) and 20 (1). It is a means whereby efficient administration is furthered, and abuse or corruption prevented. As Balakrishna Ayyar, J., has set forth in his judgment in W.P. Nos. 291 and 292 of 1957, numerous instances might be given where such a view would virtually stultify the administration of justice. We agree, with respect, with the reasoning of the learned Judge that Article 20 (3) could never have been intended for such a purpose.

Even upon the wider aspect, we do not think that the observations in *M. P. Sharma and others* v. *S. Chandra, etc.*[1], justify the extension of the principle in the manner now contended for. No doubt, Jagannadhadas, J., has stated that:

" It follows that the protection afforded to an accused in so far as it related to the phrase ' to be a witness ' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled, which in the normal course may result in prosecution."

But these dicta obviously cannot support an inference that the principle should be extended to cover a case in which there is no formal accusation at all, but an attempted ascertainment of facts as a preliminary exploratory procedure, so that it may be known whether there is an offence, and there is an offender. On the contrary, we have the clear authority of two decisions of the Supreme Court, namely, *M. Hussain* v. *State of Bombay*[2], where the relevant observations are to be found in the judgment of Bhagwati, J., at page 738, to the effect that, construing Article 20 as a whole, it related to the starting of proceedings of a criminal nature, before, a Court of law or a judicial tribunal. Similarly, we have the authority of the Supreme Court in *S. A. Venkataraman* v. *The Union of India and another*[3], wherein Mukherjea, J., has observed that :—

" the words actually used in it (Article 20) afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a Court of law or judicial tribunal."

The entire matter was considered very fully and elaborately by a Bench of the Bombay High Court (Chagla, C.J., and S. T. Desai, J.), in *Narayanlal* v. *Maneck Phiroze*[3], and with respect, we are wholly, in accord with the analysis and the conclusions to be found in this decision. It may be, as observed by Balakrishna Ayyar, J., in W.P. Nos. 291 and 292 of 1957, that the immunity conferred by Article 20 (3) will have to be extended to a point of time further back than when a person ac-

1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : (1954) S.C.R. 1077 (S.C.).
2. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : 1953 S.C.R. 730 (S.C.).
3. (1954) S.C.J. 461 : (1954) 1 M.L.J. 702: 1954 S.C.R. 1150 at 1154 (S.C.).
4. A.I.R. 1959 Bom. 320.

cused of an offence is formally before Court. But that point of time must, undoubtedly relate to a situation in which that person is, virtually and substantially, one against whom an accusation of a criminal offence has been levelled, and who has furnished replies to interrogations, in such a context. Logically speaking, the present argument would take us to the position that, where the element of testimonial compulsion is alone present, no answer given by any citizen in any context of enquiry into alleged facts, even though there may be no decision whatever at that stage to regard him as an accused, would ever be subsequently available in evidence, if he happens to become an accused even in a remote future. This, as Balakrishna Ayyar, J., has emphasised, would lead to startling results, and paralyse a variety of administrative procedures designed to safeguard the interests of the public, and to make enquiries feasible in order to prevent abuse or crime. We do not think it necessary to examine several other decisions which have been cited, and we would merely add that some of these have been examined in detail by Balakrishna Ayyar, J., in W.P. Nos. 291 and 292 of 1957. We can see no support in any of the judicial authorities cited for the view that the appellant was in the position of an accused when he furnished replies to the directives under section 19, which have been proved in evidence. This objection to the reception of a part of the evidence in these Criminal Appeals must, therefore, fail.

In result, we must unhesitatingly confirm the convictions of the appellant upon the respective charges, as the charges were established beyond any reasonable doubt. It is true that the element of *mens rea* may not be present with regard to offences of this character; and we do not desire to be understood as holding that the appellant has been guilty of infringements of the law involving any grave element of moral turpitude. But, even so, it is essential that an enactment of this character should be rigidly enforced, whoever might be the offender, in the wider interests of the public, and of this country in achieving its programme of the abolition of poverty and of planned national production. The sentences are no doubt those of heavy fine, but, considering all the circumstances, we cannot regard them as excessive. Actually, the learned counsel for the appellant have urged no plea before us upon this score. We hence confirm the sentences also; and dismiss the appeals. Finally, we desire to record our sense of obligation to the learned Solicitor-General for the State, and the learned advocate Mr. C. K. Venkatanarasimhan who has been throughout in the case and who has been assisting us throughout and the learned Advocate-General and other counsel for the appellant, who have lightened our task by careful elucidation of the law and the facts in this matter.

Ramaswami, J.—I entirely agree with my learned brother and on account of the importance of the subject I wish to add the following in regard to the point raised under Article 20 (3) of the Constitution of India.

The point raised on behalf of Mr. Goenka is that his answers to the directives issued to him by the Reserve Bank of India under section 19 (2) of the Foreign Exchange Regulation Act, 1947 (Act VII of 1947) and for the non-compliance of which penalties have been provided thereunder, are not admissible against him at the trial because (*a*) he was at the time of giving his answers a person accused of an offence and (*b*) that the answers were self-incriminatory and therefore hit at by Article 20 (3) of the Constitution which states :

> " No person accused of any offence shall be compelled to be a witness against himself."

This point was examined by Balakrishna Ayyar, J., in his judgment in W. P. Nos. 291 and 292 of 1957, filed by Mr. Goenka at an earlier stage. Balakrishna Ayyar, J., came to the conclusion that at the time Mr. Goenka delivered the answers to the directives issued by the Reserve Bank, he was not a person accused of an offence and that the answers were not compelled testimonial utterances and that Article 20 (3) of the Constitution has no application here.

We find ourselves in entire agreement with those conclusions of Balakrishna Ayyar, J., but I would like to set out my own reasons in view of the argument

addressed before us by the learned counsel Mr. V. P. Raman and by the learned Solicitor-General.

Article 20 (3) of the Constitution of India follows the language of the Fifth Amendment of the American Constitution, but their scope differs. Hence a Bench of the Bombay High Court in *Narayanlal* v. *Maneck Phiroze*[1], has pointed out how, whereas under the American Constitution the Fourth Amendment safeguarded the privacy of the home and made it unconstitutional for the issue of searches and seizures unless they were on reasonable grounds, and the Fifth Amendment dealt with what is known as testimonial compulsion, our Constitution-makers in Article 20 (3) did not deal with the Fourth Amendment but only dealt with testimonial compulsions leaving searches and seizures to be dealt with under the general law, unless searches and seizures constitute a contravention of Article 20 (3) as being testimonial compulsion for the production of documentary evidence. The difference between the language used in Article 20 (3) and the Fifth Amendment is patent. The American Constitution limits the right of immunity from compulsory testimonial to a criminal case. In Article 20 (3) of our Constitution that limitation does not appear. The protection against this compulsion under our Constitution is general. It is not confined to any particular criminal case as would appear if Article 20 (3) were to be read by itself. But in construing Article 20 (3) we must adopt some canons of construction. The first and the obvious one is to read the Article as a whole and not divorce clause (3) of that Article from the rest of it. The second is that we must not overlook the fact that the Constitution-makers in India had knowledge not only of the American Constitution but also the principles of English Common Law and also the exceptions engrafted upon those principles. Finally, we must give to this Article an interpretation which is for the greatest good of the people. We are not dealing with an ordinary statute or with an ordinary piece of legislation ; we are dealing with the Constitution of India and in interpreting the provisions of the Constitution we must not overlook the fact that the Constitution was enacted for the purposes set out in the Preamble to the Constitution. Therefore, any interpretation which advances the good of the people must be preferred to an interpretation which would retard the interest of the people of our country.

Therefore, Article 20 (3) of the Constitution should be read in the context of the second clause which precedes it and this Article should not be read in the light of the American Constitution or American decisions but more in the light of our own legislative provisions, our own legislative history, the background of English law, and the Constitution looked upon as an organic whole.

Analysing the terms in which this fundamental right has been declared in the Constitution, it may be said to consist of the following components ; (1) It is a right pertaining to a person 'accused of an offence; (2) It is a protection against 'compulsion to be a witness' and (3) It is a protection against such compulsion resulting in his giving evidence 'against himself.'

The words 'accused of any offence' seem to indicate, according to the common usage of the words, as well as by an examination of the relevant sections of the Code of Criminal Procedure, which has been made by Balakrishna Ayyar, J., an accusation made in a criminal prosecution before the Court of law or judicial tribunal where a person is charged with having committed an act which is punishable under the Indian Penal Code or any special or local law. The protection afforded to a person under Article 20 (3) is available to a person against whom a formal accusation relating to the commission of an offence has been levelled, which in the normal course may result in prosecution. In short, before the lable of an accused can be struck on a person, there must be a charge against him that he had committed an offence and there must be some proceedings against him under the Criminal Procedure Code. If the proceedings are dropped or abandoned, he will cease to be an accused.

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1. A.I.R. 1959 Bom. 320.

Thus, the guarantee under Article 20 (3) of the Constitution would be available to a person against whom a first information report has been recorded. This was the case in *M. P. Sharma* v. *Satish Chandra*[1]. In that case the Registrar of Joint Stock Companies lodged information with the Inspector-General of Police, Special Police Establishment, New Delhi, to the effect that offences under various sections of the Indian Penal Code had been committed in connection with the affairs of Dalmia Jaint Airways Ltd. The Registrar of Joint Stock Companies also stated that to determine the extent of the fraud it was necessary to seize the books not only of Dalmia Jain Airways Ltd., but also of various other allied concerns, a list of which he furnished. On the basis of this information an application was made to the District Magistrate, New Delhi, for the issue of search warrants under section 96 of the Code of Criminal Procedure. Permission to investigate the non-cognizable offences mentioned in the report was also asked for. On the same day the District Magistrate ordered investigation and also issued search warrants. The persons concerned then went to the Supreme Court and applied for a writ to quash the search warrants and for return of the documents that had been seized in execution of the search warrants that had been issued. It was argued that the fundamental right guaranteed in Article 20 (3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused. It therefore extends not only to compelled production of documents by an accused from his possession, but also to such compelled production of oral or documentary evidence from any other who may become incriminated thereby as an accused in future proceedings. The Supreme Court held that the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him, that it is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution and that considered in this light the guarantee under Article 20 (3) would be available to the petitioner therein against whom a first information report had been recorded as an accused therein and that it would extend to any compulsory process for "production" of evidentiary documents which are reasonably likely to support a prosecution against them.

It is on the foot of these observations, *viz.*, that the immunity conferred by Article 20 (3) is not confined to statements made in Court and that the immunity extends further backwards, it is argued that this protection of immunity extends backwards indefinitely and that it does not matter at what point of time the statements in question had been compulsorily obtained and that if they had been compulsorily obtained they cannot be used against the person who made them if he is eventually brought to trial. But there is no warrant for this contention on the language used in the decision of the Supreme Court wherein it has been categorically stated that the protection or immunity is available only to a person against whom a formal accusation relating to the commission of an offence has been levelled.

Therefore, we have got to see whether in the instant case when Mr. Goenka delivered his answers to the directives issued by the Reserve Bank, he was a person accused of an offence and for which two conditions must be satisfied, *viz.*, that there must be an allegation that he has committed an offence and secondly, that the proceedings must be initiated against him under the Code of Criminal Procedure in respect of the offence he is alleged to have committed. This lable of "accused" could not have been certainly stuck on Mr. Goenka at the stage of the directives.

Two recent decisions have clarified this matter. In *In re Central Calcutta Bank, Ltd.*[2], which arose under the Banking Companies Act, it was held that an examination corresponding to the directives issued by the Reserve Bank was only an exploratory examination to discover what had happened, that the person examined or interrogated is not a person accused of an offence and that a past evidence likely to be

1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : 1954 S.C.R. 1077 : A.I.R. 1954 S.C. 300.
2. A.I.R. 1957 Cal. 520.

used for a future accusation of an offence does not infringe the constitutional right that a person accused of an offence shall not be a witness against himself and that to attract that constitutional right the person must first be accused of an offence and thereafter he shall not be a witness against himself, that this constitutional protection begins with the accusation of an offence and not before, and that the language of Article 20 (3) of the Constitution means that the evidence must come after and not before the accusation of an offence to come within the constitutional prohibition. This is precisely the case here.

In *Narayanlal* v. *Maneck Phiroze*[1], which arose under the Indian Companies Act, the scope and nature of the enquiry under the said Act was considered. It was held that such an enquiry was not an investigation into an offence but an investigation into the affairs in order that apporpriate action may be taken and which may take different forms, that there was no question at that stage of a formal accusation and that inasmuch as there was no accusation, the compulsion introduced by the provisions in section 240 of the Companies Act is not a compulsion which can be struck down by Article 20 (3) of the Constitution.

Bearing these principles in mind if we examine the facts of this case, Mr. Goenka was certainly not a person accused of an offence at the stage. The object of the Reserve Bank was nothing more than to find out whether the grapevine information or bush-telegraph information that Mr. Goenka had unauthorisedly acquired dollars in the United States of America, had any foundation or not. It is obvious that much information comes to the Reserve Bank, like in the case of most departments of Government, through anonymous petitions, pseudonymous petitions and whispering campaign by disgruntled employees or traitorous friends. Much of the information on the face of it would be so absurd and incredible as it will have to be consigned to the wastepaper basket. In the case of a percentage, the Bank may like to know whether there is any truth at all in such allegations and whether the concerned person may not have a perfectly reasonable explanation to offer. On behalf of the Reserve Bank it is stated by the learned Solicitor-General that it happens every day that a number of directives are issued and if satisfactory explanations are forthcoming, the matter is dropped, or the person is advised to be careful in future or some regularisation is made. In fact Mr. Goenka himself has understood the directive only in that light. In his communication Exhibit P-7, he concludes :

> " If any further information or proof of the above statements is required by you I shall be only too glad to furnish it. If in accepting the assistance of my friends in the manner mentioned above, I have unwittingly transgressed any of the provisions of the Exchange Control Order, I request the same may be condoned."

In Exhibit P-9 he states :

> " I have been trying to collect the information required by you. . . . . I shall therefore be obliged if you will give me, say, two months' time for sending a comprehensive reply to your questions. If, however, I am able to do it earlier, I shall certainly do so."

In Exhibit P-35, he concludes :

> " I trust that in view of the foregoing you will find the explanation satisfactory and see your way to drop the matter."

Therefore, the first ingredient for invoking Article 20 (3) is not present in this case.

On that conclusion that Mr. Goenka at the stage when he delivered the answers to the Reserve Bank, was not a person accused of an offence, it follows that the statements which he made under fear of penalties prescribed by the Act would not be hit by Article 20 (3) and cannot be excluded from being used in evidence against him after he has become an accused and when he is on trial. In fact in *Sharma's case*[2], referred to above, the argument was that the fundamental right guaranteed under Article 20 (3) comprehends within its scope not merely oral testi-

1. A.I.R. 1959 Bom. 320.
2. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : 1954 S.C.R. 1077 ; A.I.R. 1954 S.C. 300.

mony given by an accused in a criminal case pending against him—"testimonial utterances"—*Vide* Underhill's 'Criminal Evidence,' Fifth Edition (U.S.A.), Vol. II, at page 905, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused and it therefore extends not only to compelled production of documents by an accused from his possession but also to such compelled production of oral or documentary evidence from any other who may become incriminated thereby as an accused in future proceedings. The judgment of the Supreme Court does not show that this argument was accepted. In fact in none of the numerous cases cited before Balakrishna Ayyar, J., or before us had it been held that a statement which a person has been compelled to make before he became a person accused of an offence could not be tendered against him at his trial, subject of course to the relevant provisions of the Indian Evidence Act. Therefore, we have also come to the conclusion that in the circumstances the documents marked by the prosecution, to which exception has been taken, were properly received in evidence.

In coming to this conclusion, the circumstances under which the protection of an accused against self-incrimination came into existence may be borne in mind. There are two contrasted systems of criminal jurisprudence, *viz.*, the Anglo-Saxon and Continental. The Anglo-Saxon Criminal Jurisprudence is described as accusatorial system and the Continental Criminal Jurisprudence is described as the inquisitorial system.

In the accusatorial system the principle is that no accused shall be compelled to incriminate himself. The history of this rule in the Anglo-Saxon system, that a man shall not be compelled to furnish evidence against himself or against self-incrimination is a long one, and is elaborately dealt with in the monumental work on Evidence by Wigmore, Third Edition, Volume VIII, Chapter LXXX, pages 276-304 and by Professor Glanville Williams in his "The Proof of Guilt" (The Hamlyn Lectures), page 36 and following.

The rule did not exist under the Tudors and early Stuarts. In fact it was the whole process of compulsion practised by the Star Chamber and High Commission which led to such revolution that the doctrine that an accused should not be compelled to self-incriminate himself came to be established in England, and has subsequently been one of the cherished rights of the English citizens and became part of the English Common Law.

So far as the United States of America was concerned, the early colonial settlers brought over the practice of compulsory questioning at least to Massachusetts. In the 18th century this practice disappeared and the contemporary English Common Law protecting the silence of the accused came to be adopted. Thirteen of the original States insisted on prohibition of self-incrimination in the Federal Bill of Rights of 1791 and in their own revolutionary constitutions, excepting in Iowa and New Jersey. The Fifth Amendment of the Constitution of the United States of America lays down that no person shall be compelled in any criminal case to be a witness against himself. That this has been subsequently developed by Courts far beyond the confines of Article 20 (3) of our Constitution, will be evident from the American decisions cited at the Bar and in the standard treatises on American Constitutional Law (see *Boyd* v. *U. S.*[1], *Wilson* v. *U. S.*[2], *U. S.* v. *Rabinowich*[3], *Betts* v. *Brady*[4], *U. S.* v. *White*[5], *Holt* v. *U. S.*[6], *Burdick* v. *U. S.*[7], *Fitzpatrick* v. *U. S.*[8], Rottschaefer's Handbook on American Constitutional Law (Horn-book series) pages 800-801, Willoughby: Principles of the Constutitonal Law of the United States, Second Edition, pages 475-477; Cooley on Constitutional Law, Fourth Edition; section 19, pages 367-368; Willis: Constitutional Law (1935) at pages 520 and following; Emerson and Haber Political and Civil Rights in the United States, page 111 and following.

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1. (1885) 116 U.S. 616.
2. (1892) 149 U.S. 60.
3. (1914) 238 U.S. 78.
4. (1941) 316 U.S. 455.
5. (1943) 322 U.S. 694.
6. 218 U.S. 245.
7. (1914) 236 U.S. 79.
8. (1899) 178 U.S. 304.

This invaluable privilege against self-incrimination conferred by Article 20 (3) will be recognised at its true worth when we consider the inquisitorial system emanating from France and spread over the Continent. Sir James Fitzjames Stephen's History of the Criminal Law of England, page 535 and following, gives a graphic description of the searching preliminary enquiries of an accused person by an examining Magistrate and the subsequent records of examination and confrontations with the contents of the dossier practised by the Presidents of the trial Courts and concludes :

> " This appears to me to be the weakest and most objectionable part of the whole system of French Criminal Procedure, except parts of the law as to the functions of the jury " (page 543).

Therefore, it is not surprising that there have been endeavours in France as well as in other Continental countries to which the French inquisitorial procedure has extended to divest the system of its more objectionable features, the latest being the U.S.S.R. Though the provisions of the Soviet Union Codes never stated that the confession is the queen of evidence, nevertheless the student of official public records of the Soviet trials is struck by the fact that self-incrimination was the only evidence on which the defendant's guilt has been founded. That this was true at many trials was frankly recognised by N. Khrushchev in his famous speech to the 20th Party Congress of the Communist Party of the Soviet Union (February 25, 1956). Therefore, the subsequently enacted Criminal Procedure Code recognised that the looking upon self-incrimination as the queen of evidence has oriented the investigative and judicial agencies in obviously wrong ways and created the possibility of rendering unfounded sentences. (*See* the two-volume work of Government, Law and Courts in the Soviet Union and Eastern Europe by Dr. Vladimir Gsovski and Dr. Kazimierz Grzybowski (1959) published by Stevens and Sons Ltd., (London); (Bulletin No. 9 of the International Commission of Jurists and Journal of the International Commission of Jurists (September, 1959), page 285 and following).

Therefore, to sum up, while we must vigilantly guard against the inquisitorial procedure invading our criminal jurisprudence, we must equally be on our guard against the abuses of the accusatorial system. This golden mean is set out by Professor Wigmore on Evidence, Third Edition, Volume VIII, page 386. The policy of the privilege against self-incrimination is plain. It exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law. But at the same time the privilege cannot be extended beyond protecting the accused in his testimonial status from the time he is accused of an offence and must be confined to the limits laid down in *Sharma's case*[1]. To loosely extend the privilege would not be in the public interest, because as Bentham wittily point out :

> " if all the criminals of every class had assembled, and framed a system after their own wishes is not this exclusion the very first which they would have established for their security".

In fact modern textbook writers on American Constitutional Law and Criminal Evidence (U.S.A.) (Lewis Mayer's American Legal System, pages 110 and 111; Wigmore on Evidence, Third Edition, Vol. 8, page 386 etc.: Underhill, Criminal Evidence, 5th edition, Vol. 2, page 905) condemn such loose extensions and say that it will one day be incredible that Judges would have descended as far as they sometimes have here gone on the road to logical absurdity.*

V.S. ——— *Appeals dismissed.*

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1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : 1954 S.C.R. 1077 : A.I.R. 1954 S.C. 300.

* The decisions of this Court recognising these limitations are : In re *Palani Moopan*; (1955) 2 M.L.J. 159; *Swarnalingam Chettiar*, In re (1955) 2 M.L.J. 269; *Palani Gounder* v. *The State*, (1956) 2 M. L. J. 273 ; *Kaliappa Nadar and others* v. *State*, Crl. App. Nos. 789 of 1956 and 3 and 19 to 25 of 1957; *Public Prosecutor* v. *Ganesa Iyer*, Crl. App. No. 164 of 1956; In re *Krishna Konar*, R.T. No. 80 of 1957; In re *Vellaya Gounder*, Crl.R.C. No. 506 of 1958, dated 17-3-1959 and In re *Perumal*, R.T. No. 102 of 1959 dated 2-12-1959; *Public Prosecutor* v. *Muhamad Dastagiri*, Crl. Appeal No. 20 of 1956.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Perumal Konar and others .. *Petitioners**

v.

Ponnan and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 145—Scope of inquiry—Question for decision—Waste land or fallow land—Title—Assignment of waste land by State to Harijans—Objection and disturbance by caste Hindu ryots—Duty of Magistrate.

For the purpose of proceedings under section 145, Criminal Procedure Code, what is more important is not adjudication of title, but possession at the crucial time. In the case of waste land or fallow land where khas possession cannot be demonstrated, possession will follow title.

Where certain waste lands reserved for assignment were assigned to Harijans, under the Revenue Board's Standing Orders, and the caste ryots of the village who objected to the assignment sought to disturb the possession of the assignees :

Held : the State was at perfect liberty to assign the lands to the Harijans who therefore got title to the lands in question, and their right to remain in possession should be protected and disturbance of such possession should be forbidden until evicted in due course of law.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, presented to the High Court to revise the Order of the Court of the *Ex-Officio* I Class Magistrate, Tirukoilur, dated 9th October, 1958 and made in M.C. No. 15 of 1958.

K. Narayanaswami Mudaliar, for Petitioners.

K. S. Ramamurthi, for Respondents.

M. Narayanamurthi, for Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—The respondents are landless poor Harijans of Mangulam in Vridhachalam Taluk. In the first quarter of 1958 they were assigned waste Government lands under the Board's Standing Orders in R.S. Nos. 114/1, 54/4, 115/1, 21/12-B, 54/2, 54/3, 50/1, 54/1, 50/2, 111/1, 36/16, 189/1, 189/2 and 50/4 of Mangulam villages. It would appear that the caste ryots of the village who were interested in these waste lands objected to the assignment and therefore sought to disturb the possession of the assignees.

I need not point out that waste lands are always at the disposal of the Government. Rules for assignment are twofold. If the waste lands are being reserved for assignment to certain categories of people like Harijans or *Tyagis* or ex-military men, the right of the State to assign them to them cannot be disputed. But if in the case of unreserved waste lands competition for assignment is between two sets of unprivileged persons, the Board's Standing Orders make provision for preference being given to persons who have been cultivating the lands or owners of adjoining land, etc.

Therefore, in this case, the State was at perfect liberty to assign the land to poor Harijans of Mangulam and therefore the respondents have got title to these disputed lands.

The more important point, however, for the 145 proceedings, is not adjudication of title, but possession at the crucial time mentioned in the section itself. In this case the land has been lying fallow and it is a well-settled principle of law that in regard to waste land or fallow land where khas possession cannot be demonstrated possession will follow title.

* Crl.R.C. No. 910 of 1958.
(Crl.R.P. No. 872 of 1958.)

11th February, 1960.
(22nd Magha, 1881, Saka).

Therefore, the learned First Class Magistrate was right in holding that these rights of Harijans to remain in possession should be protected unless and until evicted therefrom in due course of law and in forbidding disturbance of such possession until such eviction. The order of the First Class Magistrate is correct and this revision is dismissed.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Muthiah Chettiar .. *Petitioner**

Madras General Sales Tax Act (IX of 1939), section 15 (2) (a) and Madras General Sales Tax (Turnover and Assessment) Rules (1939), rule 11—Applicability—Oilmonger having country chekku and also purchasing soil from others and trading thereon—Failure to submit return—Offence—Government Notification, dated 6th May, 1953—Scope of.

An oilmonger who owns and runs a country chekku for expelling oil which he sells can claim exemption from payment of sales tax and from the obligation to submit a return under Government Notification, G.O. No. 1323, Revenue, dated 6th May, 1953, issued under section 6 of the Madras General Sales Tax Act, 1939, only if he deals exclusively in the produce of such chekku or oil-press. Where it is found that besides the sale of such produce, he had been purchasing large quantities of oil from others and trading in that oil, and his turnover clearly shows that he could not have been dealing in the very small quantities which alone the country oil-press would expel, he is not entitled to the benefit of the Notification, and, failure on his part to submit a return would be punishable under section 15 (2) (a) of the Sales Tax Act, read with rule 11 of the Turnover and Assessment Rules (1939).

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Additional Sessions Judge of the Court of Session, Tirunelveli Division, dated 28th March, 1959 and made in C.As. Nos. 26 to 29 respectively (C.C. Nos. 29 to 32 of 1959, respectively on the file of the Sub-Divisional Magistrate, Koilpatti).

M. Srinivasagopalan, for Petitioner.

M. Narayanamurthi, for Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—This batch of revision cases arises from the convictions and sentences in C.C. Nos. 29 to 32 of 1959 on the file of the Sub-Divisional Magistrate, Koilpatti. The accused, who is an a oilmonger, was convicted under section 15 (2) (a) of the Madras General Sales Tax Act. The Sub-Divisional Magistrate sentenced the appellant to fines of Rs. 300, 400, 400 and Rs. 600. But the Additional Sessions Judge, Tirunelveli, affirmed the convictions, but reduced the sentences uniformly to Rs. 100 each.

The facts are short. This revision petitioner is an oilmonger running a country chekku for expelling oil. I need not point out that a country press can be used for extracting oil from groundnuts, gingelly, cocoanuts and castor-seeds.

On 13th November, 1956, P.W. 1, the Special Assistant Commercial Tax Officer, inspected the shop of the accused, and found him dealing in different kinds of oils, and trading in oils by purchasing from others. He recorded the statement, Exhibit P-1, wherein the accused admitted that he had purchased oil from others, and that he had been stocking them.

So far as C.C. Nos. 29 to 32 of 1959 are concerned, the accused stated that he had purchased cocoanut oil from one Karuppiah Nadar of Sankarankoil. Fifteen tins of groundnut oil, 5 tins of castor oil, 1/2 tin of gingelly oil and 1½ tins of cocoanut oil were found in the shop of the accused.

* Crl.R.C. Nos. 683 to 686 of 1959. (Crl.R.P. Nos. 664 to 667 of 1959.) — 11th February, 1960. (22nd Magha, 1881, Saka).

From the statement recorded by the Assistant Commercial Tax Officer from the accused, it was seen that the accused had a total turnover of Rs. 31,254-11-0 during April, 1952, to March, 1953. The turnover for 1953-54 was Rs. 24,858-13-0, the turnover of 1954-55 was Rs. 22,301-12-6; and the turnover for 1955-56 was Rs. 34,094-3-6.

Thereupon, the Deputy Commercial Tax Officer, Sankarankoil, took further action, and one set of action related to levying of the escaped assessment which resulted in the Sales Tax Appellate Tribunal finally dismissing the appeal of the accused and recovery of the escaped assessment from the accused. The other set of action was the prosecuting of this accused for offences under section 15 (2) (a) of the Madras General Sales Tax Act, read with rule 11 of the Madras General Sales Tax (Turnover and Assessment) Rules in that the accused wilfully failed to submit accounts.

The case for the accused was, that because he has been keeping a country oil press, he is exempted from payment of sales tax, and submission of returns.

The Notification, G.O. No. 1323, Revenue, dated 6th May, 1953, states:

"In exercise of the powers conferred by section 6 of the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939), the Governor of Madras hereby exempts permanently with effect from the 1st April, 1953, every person owning or having an interest in country oil chekkus, single or multiple and dealing exclusively in the produce of such chekkus from payment of any tax under section 3 (1) of the said Act in respect of such dealings".

But the facts here clearly show that the accused was not dealing exclusively in the oils expelled by the chekku run by him. On the other hand, he has been purchasing from others and trading on that oil. His turnover also clearly shows that he could not have been dealing in the very small quantities which alone his country oil press would expel.

The convictions are, therefore, correct; and the sentences are proper. The revisions are dismissed.

P.R.N. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

Munian Muthuraja ... *Petitioner.**

v.

P. S. Rajarathinam ... *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955, as amended by Act XIV of 1956), sections 2 (a) and (b) and 4-B—Applicability—"Agriculture"—Lessee of usufruct of cashewnut plantation—If cultivating tenant—Right to benefit of section 4-B.

A person who takes land on lease for enjoyment of the usufruct of the cashewnut plantation thereon is a "cultivating tenant" as defined in section 2 (a) of the Madras Cultivating Tenants Protection Act, and he must be held to be engaged in "cultivation" as defined in section 2 (b):

Irrespective of the nature of the produce of the land, whatever is grown, aided by human labour and effort, would be an agricultural produce and the process of producing it would be "agriculture" and the lessee in respect of a cashewnut plantation would be certainly a person engaged in "cultivation", and hence entitled to the benefit of section 4-B of the Act, as amended by Act XIV of 1956.

Chacko, In re, (1954) 2 M.L.J. 737, applied and followed.

Petition under section 6-B of Madras Act XXV of 1955 read with section 115 of Act V of 1908 praying the High Court to revise the Order of the Revenue Court, Tanjavur, dated 26th December, 1959 and made in P. No. 1026 of 1959.

K. Raman, for Petitioner.

R. Sundaralingam, for Respondent.

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* C.R.P. No. 376 of 1960. 25th March, 1960. (5th Chaitra, 1882, Saka).

The Court delivered the following

JUDGMENT.—This revision proceeding raises an interesting point under section 4-B of Act XXV of 1955 as amended by Act XIV of 1956. The facts are very simple. The revision petitioner is a lessee for a period of one year in respect of a cashewnut plantation. The landlord refused to execute a lease-deed as required by section 4-B of Act XXV of 1955, though the revision petitioner was admittedly not in arrears, and has actually deposited the advance amount due. The case of the landlord was not that the revision petitioner was in arrears and was therefore liable to be evicted, but that the revision petitioner was not a 'tenant' as defined under the Act, because the land was not taken on lease for the use of the land for the purpose of agriculture or horticulture as defined in section 2 (*b*). The argument here is that the revision petitioner took the land on lease for enjoyment of the usufruct in respect of the cashewnut plantation, and that this would not bring him within the definition of 'cultivating tenant' (section 2 (*a*) of the Act), which depends in its turn upon the definition of 'cultivation' under section 2 (*b*) of the Act. The learned Officer presiding over the Revenue Court, Tanjore, thought that this argument had substance, and hence dismissed the application as not maintainable.

I think that very little is needed to show that the view adopted by the Revenue Officer is erroneous. The matter has been fully dealt with by Ramaswami, J., in *Chacko*, In re[1]. The learned Judge observes as follows :—

"Irrespective of the nature of the produce or product of the land, whatever is grown aided by human labour and effort, whatever does not grow spontaneously on the soil without human labour or effort, would be an agricultural product, and the process of producing it would be agriculture within the meaning of that expression."

After this, the learned Judge has collected the authorities holding, *inter alia*, betel leaves, cardamom and mango to be agricultural products so defined. It logically follows that lessees in respect of such plantations would certainly be persons engaged in 'cultivation' within the meaning of section 2 (*b*) of Madras Act XXV of 1955.

What is now urged before me by the learned counsel for the respondent is that the revision petitioner was a lessee only in respect of the usufruct, so that there is no evidence to indicate that he was engaged in actual manual labour of any kind on the land, with regard to the plantation. But I take it that the test would be the same whether with reference to a usufructuary mortgage or a lease, so long as there is a cashewnut plantation, and it is the subject of the lease. The lessee will necessarily have to provide the minimum care for the plantation, and so long as we may take judicial notice of this fact, he would certainly be a person engaged in 'cultivation' within the meaning of the Act. Otherwise, the result would be the patently fallacious and absurd one, that, in every case, the application of the definition would depend upon oral evidence as to the kind of manual labour employed by the lessee. It is not pretended that cashew trees, being organic growth, can subsist by themselves without the necessary minimum care, such as watering, etc. In the case of a lease, it is obviously the lessee in occupation who will be providing this minimum care. I have no hesitation in holding that the cultivation of cashew trees in that sense, under a lease of the usufruct, comes within the definition of agricultural use, and that the present revision petitioner is, therefore, a 'cultivating tenant,' as specified in the Act.

The revision proceeding is accordingly allowed, and the order of the Revenue Officer is set aside. The application is itself remitted to the Court below for further disposal in the light of these observations. There will be no order as to costs.

P.R.N. *Appeal allowed;*
Application remanded.

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1. (1954) 2 M.L.J. 737 at 742.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Subramania Mudaliar .. *Appellant**

v.

Ammapet Co-operative Weavers Production & Sales Society by President, S. Gopalaswami Mudaliar .. *Respondent.*

Contract—Offer and acceptance—Communication of acceptance—Necessity—Contract for sale of land—Time—If essence of contract.

Pleadings—Relief—Right of party to abandon own case and claim relief on basis of opposite party's case.

The acceptance of an offer made must be communicated to the party making the offer and when there has been no such communication, there can be no completed contract which can be specifically enforced.

Where an offer is made by a person to purchase a house belonging to a co-operative society, it is necessary that the resolution of the society accepting the offer of the would-be purchaser should be duly communicated to the latter and, unless there is such a communication of the resolution, there is no completed contract.

In cases of sales of immoveable, time is not normally to be considered as essence of the contract.

Jamshed Khodaram v. *Burjorji Dhunjibhai*, (1915) 30 M.L.J. 186 : L.R. 43 I.A. 26 : I.L.R. 40 Bom 289, relied on.

A plaintiff cannot be allowed to abandon his own case and then turn round and adopt that of the defendant and claim relief on that footing.

Govindaraj v. *Kandaswami Goundar*, (1956) 2 M.L.J. 578, followed.

Appeal against the Decree of the District Court of West Thanjavur, in Appeal Suit No. 91 of 1957, preferred against the Decree of the Court of the District Munsif of Thanjavur, in Original Suit No. 61 of 1956.

K. S. Champakesa Iyengar, for *R. Gopalaswami Iyengar*, for Appellant.

K. Shanmukham, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the Appellant. He brought the suit for specific performance of an alleged contract to sell the building belonging to the respondent. The respondent is a co-operative society.

The case for the plaintiff is this. In the end of January, 1956, the defendant-society called for offers for the sale of the house. There were offers up to Rs. 2,500. The plaintiff gave a petition for purchase of R. 2,550. The Board, by its resolution No. 391, dated 3rd September, 1956, accepted the plaintiff's offer and authorised a sale-deed to be executed by the President if the sale could be concluded before 2nd March, 1956. The plaintiff was informed by the President of this resolution and subsequently he was told that a draft sale-deed might be submitted after Mahamaham, that is to say, by about 7th March, 1956. Accordingly the plaintiff submitted a draft sale-deed, but the defendant did not sell the house because the sale was not completed before 2nd March, 1956, according to the resolution. This answer of the defendant was also embodied in a resolution, dated 5th March, 1956. It may be mentioned that it was only after this resolution that the plaintiff sent a draft. The defendant admitted the offer made by the plaintiff and also the first resolution passed by the Society and the fact that the President informed the plaintiff of the resolution and added that the plaintiff agreed to the time-limit and, as he did not keep to the time-limits, the subsequent resolution was passed. The defendant denied that there was any mention to the plaintiff that the draft might be submitted by 7th March, 1956. On these facts, issues were framed as follows :—

(1) Was there any stipulation as to the time, for plaintiff's fulfilling the contract and, if so, was time essence of the contract?

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* S.A. No. 60 of 1958. 2nd March, 1960.
(12th day of Phalguna, 1881, Saka.)

(2) Was there a completed contract in law?

Two other issues also were framed which are not necessary for the purpose of the contentions before me in Second Appeal. The first Court decreed the suit, but in appeal the District Judge dismissed the suit. Hence this Second Appeal by the plaintiff.

The appellate Court went on the footing that time was of the essence of the contract and as the plaintiff, knowing the terms of the resolution, did not conform himself to those terms, he could not be allowed specific performance. As regards the communication, in paragraph 8 of his judgment, the learned District Judge observed :

> "It was the duty of the plaintiff to obtain the Board's resolution in writing accepting his offer as per Exhibit B-2 and the terms of the resolution. He cannot for one purpose rely on the resolution and for another purpose escape from its terms."

In paragraph 10 he says :

> "There is nothing to show that plaintiff was ready and willing to perform his part of the contract within the time limit. In fact, he appears to have taken it leisurely on some alleged assurance by the President, that is hardly worth any credence."

In paragraph 12 he held that there was no completed contract and that, in any event, time was of the essence of the contract and therefore he found the points in favour of the defendant and dismissed the suit.

In appeal before me, the main contention of the appellant was that time was not of the essence of the contract. If the case has to be decided only on that point, I must agree with the contention of the appellant that in this case time cannot be said to be of the essence of the contract. I have only to refer to the decision in *Jamshed Khodaram* v. *Burjorji Dhunijbhai*[1], to hold that in such a case of sales of land, that is of immovable property, time is not normally to be considered as essence of the contract.

But by far the most important question that appears to me and on which the learned counsel for the respondent relies is whether there has been a completed contract, that is to say, whether there has been a communication of the resolution passed by the society to the plaintiff? The plaintiff states in his evidence that

> "no information was given to me nor was I informed on 23rd February, 1956, that I might complete the sale by 3rd March, 1956. The President asked me to prepare draft on 7th March, 1956, orally. On 3rd February, 1956, he said that resolution has been passed deciding to sell the house to me."

The evidence of the plaintiff clearly shows therefore that the entire terms of the contract were not communicated by the President to the plaintiff. Notwithstanding this fact, the lower Court has held that undoubtedly the President must have informed the plaintiff of the entire resolution. But it is necessary to refer to the circumstances under which the President is said to have informed the plaintiff. While the plaintiff was in his shop the President is said to have told him at the shop at about 7 P.M. of the passing of the resolution. This is the communication which is relied on by the plaintiff for the purpose of showing that there is a completed contract between the plaintiff and the defendant. It is contended by Mr. Shanmugham, learned counsel appearing for the society, that this casual information would not amount to a communication and therefore this would not amount to a completed contract. He relied on the decision in *Powell* v. *Lee and other*[2]. There, the managers of a school passed a resolution appointing the plaintiff, who had applied for the post, to the position of Headmaster ; but the decision at which they had arrived was not communicated to the plaintiff. It was held that the passing of the resolution without communication to the plaintiff did not constitute a contract to appoint him to the post for the breach of which the plaintiff was entitled to sue. On the facts of that case it is clear that one of the members of the Committee gave information to the plaintiff in that case. It was observed that

1. (1915) 30 M.L.J. 186 : L.R. 43 I.A. 26 : I.L.R. 40 Bom. 289 (P.C.).
2. 99 L.T. 284.

"where a body of six people, acting not as corporation or as a board of directors but as six persons having the power to appoint to a post, vote on the question and resolve to appoint someone, they do not make a concluded contract then and there. There must be something more. There must be a communication made by the body of persons to the selected candidate. In the above case, the managers authorised a communication to Mr Parker to the effect that he had not been elected ; but they did not authorise a communication to Mr. Powell to the effect that he had been elected. To my mind that implies that they reserved the power to consider the matter".

The facts disclose that only one of the members informed Powell of the acceptance of his application and of appointment by the body of Mr. Powell as Headmaster.

In the above case under appeal, according to the rules of the Society :

"The Secretary shall be responsible for the executive administration of the Society subject to the control of the President".

Rule 23 (*c*) says :

"The Secretary shall be the officer to sue or be sued on behalf of the Society and all bonds in favour of the Society shall be in the name of the Society."

This rule shows that any communication on behalf of the Board must be by the Secretary as such not by the President in a casual way to any persons who may have dealings with the Society. I hold, therefore, that, construing the Rules along with the evidence in the case, there has been no communication by the Society as such to the plaintiff. If there has been no communication, then there has been no concluded contract.

According to the plaintiff's evidence, the entire terms were not communicated. He was only informed of the acceptance and not about completing the transaction before a particular date. He cannot be allowed to turn round and abandon his case and rely upon the defendant's case that the entire resolution was communicated to him. As pointed out by Rajagopala Ayyangar, J., in *Govindaraj* v. *Kandaswami Goundar*[1] :

"The plaintiff cannot be allowed to abandon his own case, adopt that of the defendants and claim relief on that footing".

On the facts, therefore, I hold that there has been no communication of the resolution to the plaintiff and therefore there has been no completed contract in this case, and in this view the plaintiff's case must fail.

The appeal is, therefore, dismissed with costs. Leave refused.

P.R.N. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

R. V. Khalilur Rahaman Sahib .. *Petitioner**

v.

S. H. Syed Hussain .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 95—*Scope and applicability—Claim for damages for wrongful attachment before judgment—When could lie.*

It is no doubt true that the setting aside of the order of attachment which is alleged to have been obtained on insufficient grounds is not an essential preliminary to the grant of compensation under section 95 of the Civil Procedure Code. But when an order of attachment so obtained has been made absolute after hearing the parties, it would mean that according to the Court the application for attachment was made on sufficient grounds and if that order has become final, it will not be open to the same Court on a subsequent application under section 95 of the Civil Procedure Code to hold the contrary. So long as the prior binding order of attachment, which has been allowed to become final, is not set aside either by appeal or review or otherwise, an application under section 95 of the Civil Procedure Code cannot be allowed on the ground that the order has been procured on insufficient grounds. This is really a case of applying the principle of the rule of *res judicata* embodied in the Civil Procedure Code, which may not, however, in terms apply. But where the order of attachment that has become final is only *ex parte* and there is no final order on the merits and after considering the objections of the defendant, then it will not be equitable to apply the above rule.

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1. (1956) 2 M.L.J. 578, 584.

* C.R.P. No. 634 of 1957.

7th May, 1960.
(17th day of Vaisakha, 1882, Saka).

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Vellore, dated 24th December, 1956 and made in C.M.A. No. 48 of 1956, preferred against I.A. No. 205 of 1955, in O.S. No. 385 of 1954, on the file of the Court of the District Munsif, Vellore.

T. L. Nagaraja Rao, for Petitioner.

M. R. M. Abdul Karim, for Respondent.

The Order of the Court was made by

Rajamannar, C.J.—This Civil Revision Petition originally came up for hearing before Ramachandra Iyer, J., who considered that the case may be posted before a Division Bench in view of the conflict between the decisions in *Rama Mudali* v. *Marappa Goundan*[1] and *Palanisami Goundar* v. *Kaliappa Goundar*[2].

This petition arises out of an application under section 95 of the Code of Civil Procedure for the award of compensation for attachment on insufficient grounds. It is sufficient to state the following facts. The petitioner before us filed a suit, O.S. No. 385 of 1954, in the Court of the District Munsif of Vellore against the respondent to recover a sum of Rs. 1,260-2-0. Along with the suit he also filed I.A. No. 1245 of 1954, for attachment before judgment of the respondent's residential house at Gudiyatham on 16th December, 1954. An interim order of attachment was passed and the property was actually attached on 17th December, 1954. On 12th January, 1955, time till 19th January, 1955, was given to the respondent to file a counter-affidavit. The counter-affidavit appears to have been filed and the matter was posted for enquiry to 27th January. Eventually, on 4th March, 1955, the suit itself was decreed *ex parte* and the attachment was made absolute. Subsequently, the respondent appears to have got the *ex parte* decree set aside, but evidently no application was made to have the attachment set aside. The respondent thereafter filed the application, out of which this revision petition arises, I.A. No. 205 of 1955, under section 95 of the Code of Civil Procedure, allegeing that the attachment was procured maliciously on untrue allegations. The respondent stated that he was possessed of vast properties and extensive lands and he was also carrying on a lucrative business. The attachment was therefore obtained on false and insufficient grounds with a view to injure his reputation. The respondent claimed damages in a sum of Rs. 1,000. The learned District Munsif held that the attachment was effected *mala fide* and on insufficient grounds. He overruled an objection that the application was not maintainable, because there was no order setting aside the attachment. He considered a sum of Rs. 300 would be adequate compensation and accordingly directed the petitioner to pay the said amount. There was an appeal by the petitioner before us to the Subordinate Judge of Vellore but the appeal was dismissed. The learned Subordinate Judge agreed with the District Munsif on all points. He found that the attachment was secured on false and insufficient grounds. He also held that the petition was maintainable though the order of attachment had been made absolute and there was no order setting aside the attachment. The petitioner seeks from this Court a revision of the said order of the Subordinate Judge confirming the order of the District Munsif.

Obviously, this Court cannot go behind the findings of the Courts below that the attachment was procured on false and insufficient grounds and that the sum of Rs. 300 would be adequate compensation. The argument was therefore confined to the question whether the respondent could be granted any compensation so long as there was an order of attachment which had been made absolute and there was no order setting aside the said attachment. Before we deal with the decisions cited to us, we would point out that there are two aspects from which the question can be approached. One is that an application under section 95 of the Code of Civil Procedure is not maintainable once an attachment has been made absolute after notice and there has been no subsequent order cancelling such attachment. This is the aspect emphasised in the decisions cited to us. The other as-

1. (1934) 67 M.L.J. 448.
2. (1940) 1 M.L.J. 782.

pect is not that the application itself is not maintainable but that the prior order of attachment which had been allowed to become final would preclude the Court from holding that the attachment had been procured on false and insufficient grounds. The reasoning is as follows: If the application for attachment had been made on false or insufficient grounds, then it would be open to the defendant on notice to come up and convince the Court that there was no valid reasons for ordering an attachment. But if in spite of opposition by the defendant the Court were to hold that there are good grounds for ordering attachment and make the attachment absolute, how can it be held on a subsequent application (under section 95, Civil Procedure Code) that the attachment was obtained on false or insufficient grounds? The prior order of attachment which had become final would be circumvented. Bearing these two aspects in mind we shall deal with the decisions cited to us. Before doing so we shall set out the material portion of section 95, Civil Procedure Code.

"95 (1).—Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(*a*) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds. . . . . the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him."

In *Palaniandi Moopan* v. *Pachi Palaniandi Moopan*[1], Cornish, J., held the passing of an order absolute for attachment before judgment is no bar to the entertainment of an application under section 95, Civil Procedure Code, for compensation for obtaining such order on insufficient grounds. The facts in this case were these. The plaintiff applied for and obtained an interim order of attachment before judgment under Order 38, rule 5. The defendant by his counter-affidavit denied the plaintiff's allegations, but the order of attachment was made absolute on 5th November, 1925. In the counter-affidavit filed on behalf of the defendant, he reserved his right to apply for compensation under section 95 and eventually the application under section 95 was filed. The suit was decreed in favour of the plaintiff on 22nd October, 1926. The District Munsif awarded compensation to the defendant on the ground that the allegation made by the plaintiff was false. The order of the District Munsif was confirmed on appeal by the Subordinate Judge. It was contended for the petitioner that in view of the order absolute, the Court had no jurisdiction to entertain the petition for compensation under section 95. The argument is thus stated:

"The argument would seem to go the length of proposing that when once the Court is satisfied that an attachment should be made absolute, and that order is not appealed against, the question whether the attachment was applied for on insufficient grounds cannot be reopened by the party aggrieved by the order."

A judgment of Ramesam, J., in an earlier case, *Venkatappayya* v. *Venkatapayya*[2], was relied upon but the learned Judge Cornish, J., thought that the case before him differed from that before Ramesam, J. The conclusion of the learned Judge was that the right under section 95 to give compensation is independent of the passing of a prior absolute order of attachment. Beasley, C.J., took a different view in *Rama Mudali* v. *Marappa Goundan*[3]. In that case the suit was one on a promissory note and the plaintiff obtained an interim order of attachment of the defedant's cattle. Later on, before the suit had been decided and without having obtained any order setting aside the order attaching the property, the defendant put in an application for compensation on the ground that his cattle had been wrongfully attached. The learned Chief Justice held on the authority of *Lees* v. *Patterson*[4], and other cases that the application for compensation could not be made until in appropriate proceedings the order of attachment had been set aside. The earlier decision in *Palaniandi Moopan* v. *Pachi Palaniyandi Moopan*[1], was apparently not cited to the learned Chief Justice.

1. 1931 M.W.N. 956.
2. A.I.R. 1923 Mad. 352.
3. (1934) 67 M.L.J. 448.
4. L.R. (1878) 7 Ch.D. 866.

Palanisami Goundar v. *Kaliappa Goundar*[1], considered both the decisions in *Palaniandi Moopan* v. *Pachi Palaniyandi Moopan*[2], and *Rama Mudali* v. *Marappa Goundan*[3]. It is important to notice that the learned Judge was dealing with two appeals, an appeal against an order making absolute an attachment before judgment and another appeal against the dismissal of an application under section 95 of the Code of Civil Procedure for compensation for wrongful attachment. In the trial Court an application to vacate an *ad interim* attachment and the application for compensation were heard together. The learned Judge observed :

> " In such circumstances it seems hardly fair to apply as against the appellant the rule embodied in *Rama Mudali* v. *Marappa Goundan*[3] according to which an application for compensation for wrongful attachment would not lie until the attachent itself has been set aside. The trial Court had before it an application to set aside the attachment and abstained from passing orders on it until the hearing of the application for compensation was finished. Similarly in this Court I have before me both an appeal against the order confirming the attachment and an appeal against the dismissal of the application for compensation."

Incidentally he referred to the decision of Cornish, J., in *Palaniyandi Moopan* v. *Pachi Palaniyandi Moopan*[2], and evidently the learned Judge thought that the view taken there is correct. He then proceeds to comment as follows on the decision of Beasley, C.J., in *Rama Mudali* v. *Marappa Goundan*[3] :

> " . . . . . . with all respect to the learned Judge who decided the former case, it does seem to me that the requirements of an application under section 95 should be based on the language of the section and not on rules obtaining in Common Law with reference to a similar but not identical Common Law remedy. The decision in *Rama Mudali* v. *Marappa Goundan*[3], is based on *Lees* v. *Patterson*[4], which was a case in which damages for the wrongful issue of a writ of *ne exeat* were refused on the ground that the writ had not been set aside. But it seems to me that no such preliminary step has been prescribed in section 95 which alone governs the procedure in a summary application for compensation for wrongful attachment. I doubt whether one would be justified in hedging this remedy round with restrictions which the section itself does not import."

These observations were really in the nature of *obiter* because there was a pending application for setting aside the order of attachment.

Pausing for a moment here, with respect, we agree with the opinion expressed by Wadsworth, J., that the setting aside of the order of attachment is not an essential preliminary to the grant of compensation. An application under section 95 cannot be dismissed *in limine* on the ground that there is a subsisting order of attachment. But the learned Judge has not dealt with the other aspect mentioned by us at the opening of the judgment, namely, that an order making the attachment absolute after hearing the parties would mean that according to the Court the application for attachment was made on sufficient grounds, and if that order has become final, it will not be open to the same Court on a subsequent application under section 95 to hold to the contrary. It should not be overlooked that the Court to which an application under section 95 has to be made is the very Court which has passed the order of attachment. This aspect is stressed by Ramesam, J., in *Venkatappayya* v. *Venkatappayya*[5], which was decided earlier than the cases above mentioned. In that case the District Munsif passed an order granting an *ad interim* injunction after notice to the defendant and after hearing both parties. Subsequently the defendant furnished security and the temporary injunction was dissolved. A few days later the defendant filed an application for compensation from the plaintiff on the ground that the application for temporary injunction was made on insufficient grounds. The learned Judge held that the petition did not lie. He doubted whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds. He said :

> " In my opinion the petition of the respondent does not lie. It is not pretended that the application was based on anything that appeared in the trial of the suit (which actually took place in March, 1921). It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds

1. (1940) 1 M.L.J. 732.
2. 1931 M.W.N. 956.
3. (1934) 67 M.L.J. 448.
4. L.R. (1878) 7 Ch.D. 866.
5. A.I.R. 1923 Mad. 352.

and the plaintiff has not ultimately failed in his suit, (see *Roulet* v. *Fetterle*[1]). But assuming that even where after an order was made on hearing both parties and the plaintiff has ultimately succeeded, a petition lies under section 95 for compensation—such cases must be very rare indeed—the stage for such an application would be only when the suit is heard. Up to then, such a petition would be premature—see *Sokkalingam Chetty* v. *Krishnaswami Ayyar*[2]. I am not saying that when the order was refused, compensation cannot be asked immediately without waiting for the suit.

In my opinion to allow a petition of this kind immediately after the main petition was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit, will be generally to permit a Court to come to a conclusion inconsistent with and opposed to its prior order. I do not think such an anomaly is intended by section 95."

With great respect, we find ourselves in entire agreement with this view which appears to us to be both common sense and sound in law.

In *Gyan Prakash Mital* v. *Kishori Lal*[3], the view taken by Beasley, C.J., in *Rama Mudali* v. *Marappa Goundan*[4], was followed by Yorke, J., who referred also to the decision of the Calcutta High Court in *Satish Chandra Banerji* v. *Lala Munilal*[5], where it has held that the rightness or wrongness of the order for attachment before judgment could not be canvassed in a subsequent suit on the question of damages for malicious prosecution, and such a suit was not maintainable where in the prior suit the order of attachment was not vacated and the rights of the parties were determined on the basis that it was a right order. We look at the matter this way. There is a prior binding order that there are sufficient grounds for making an attachment before judgment. That order has been allowed to become final. So long as that order has not been set aside, either by appeal or review, or otherwise, an application under section 95 of the Code of Civil Procedure cannot be allowed on the ground that the order had been procured on insufficient grounds. It is really a case of applying the underlying basis of the rule of *res judicata* embodied in section 11 of the Code of Civil Procedure, which may not in terms apply. Before we apply this rule of *res judicata*, we think one essential condition must be satisfied. The Court must have heard and finally decided after hearing the parties whether there are sufficient grounds for ordering attachment before judgment. If, on the other hand, an order of attachment was only *ex parte* and there was no final order on the merits and after considering the objections of the defendant, then it will not be equitable to apply the rule. We realise that the view we are now taking is actually not to be found in any of the decisions cited to us. But we think it is the proper view to take.

In the present case though a counter-affidavit was filed by the defendant, there does not appear to have been any considered order passed by the Court making the attachment absolute. Actually the attachment was made absolute on the day on which the decree was passed, almost automatically. It cannot be said that the Court heard and finally decided whether there were sufficient grounds for ordering the attachment. In these circumstances there was no bar to the application under section 95 of the Code of Civil Procedure. The decision of the Kerala High Court in *Subrayan* v. *Kochuvarkey*[6], does not carry the matter further than *Palanisami Goundar* v. *Kallappa Goundar*[7]. In view of the findings of fact on the other points which are binding on us, the order of compensation must stand. The Civil Revision Petition is dismissed but there will be no order as to costs.

R.M. *Petition dismissed.*

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1. (1894) I.L.R. 18 Bom. 717.
2. (1919) 38 M.L.J. 324.
3. I.L.R. (1942) All. 360.
4. (1934) 67 M.L.J. 448.
5. (1932) I.L.R. 59 Cal. 1073.
6. A.I.R. 1959 Ker. 18.
7. (1940) 1 M.L.J. 782.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AIYAR.

P. Kanthammal .. *Appellant**

v.

D. S. Rajalakshmi .. *Respondent.*

Civil Procedure Code (V of 1908), section 95 (1) (a) and (b)—Applicability—Conditions—Promissory note executed by two persons—Endorsement by holder to nominee of one—Suit by endorsee—Attachment before judgment of money belonging to executant causing endorsement in favour of plaintiff—Dismissal of suit as against such executant—Application for compensation by successful defendant against benamidar plaintiff—Maintainability—Starting point of limitation—Limitation Act (IX of 1908), Article 181—" When the right to apply accrues "—Interpretation of.

On 17th December, 1947, Kanthammal and Kuppuswami Chetti executed a promissory note for Rs. 10,000, in favour of one Ispahani who, on 13th December, 1950, endorsed it without recourse to one *R*. *R* brought a suit on the promissory note against both the executants and obtained an order for attachment before judgment on 5th March, 1952, of an amount lying in Court to the credit of Kanthammal. But by some mischance, the amount was paid out to her. The *ex parte* order of attachment was confirmed on 29th January, 1954.

The suit was ultimately decreed only against Kuppuswami Chetti and dismissed as against Kanthammal, on 1st November, 1955, on the finding that the promissory note was endorsed to the plaintiff *R*, at the instance of Kanthammal on the understanding that the plaintiff would realise the money only from Kuppuswami Chetty and that therefore the plaintiff was not entitled to any decree against the 1st defendant Kanthammal—who had no objection to a decree being passed against the 2nd defendant Kuppuswami Chetti. It was found that Kanthammal herself was responsible for instituting the suit and also paid the Court-fee and engaged counsel for the plaintiff. Subsequently Kanthammal and *R* fell out and therefore *R* decided to press the suit against Kanthammal also. After the dismissal of the suit as against Kanthammal, the latter in 1955 applied for compensation against *R* under section 95, Civil Procedure Code.

Held : (1) that on the finding that Kanthammal herself was responsible for instituting the suit, and the real plaintiff was herself and not *R*, she could not ask for compensation as against herself.

(2) that it could not be said that the suit was instituted by *R* as against Kanthammal only at the time she repudiated her understanding with the latter, and that the word "institute" in section 95 (1) (*b*) would not bear such a construction, which would involve the reading into it words which are not not found therein ;

(3) that on the finding that *R* was only a benamidar for Kanthammal and that it was for her benefit that the suit was instituted, it might follow that the attachment was applied for on insufficient grounds as *R* had no real claim against Kanthammal though the attachment was confirmed, and section 95 (1) (*a*) would be attracted because, to bring the case under that provision, it would be sufficient to show that the attachment was effected and that it was applied for on insufficient grounds ;

(4) that assuming that section 95 (1) (*a*) applied to the case, the claim was barred under Article 181, Limitation Act, which applied to the case, and under which time would begin to run from the time when the attachment was effected, and not when the suit is subsequently disposed of. The right to apply accrued when the attachment was first effected that is in 1952 ; the application made in 1956—more than three years after the attachment—was clearly barred by time.

Appeal against the Order of the City Civil Court, Madras, dated 8th October, 1956 and made in I.A. No. 395 of 1956 in Original Suit No. 1694 of 1955.

T. R. Srinivasa Iyengar, for Appellant.

O. K. Nambiar, for Respondent.

The Court delivered the following

JUDGMENT.—On 17th December, 1947, two persons named Kanthammal and Kuppuswami Chetti executed a promissory note for Rs. 10,000 in favour of one Ispahani. On 13th December, 1950, Ispahani endorsed the note without recourse to one Rajalakshmi. Thereafter, Rajalakshmi instituted C.S. No. 64 of 1951 on the file of this Court to recover the money due on ths promissory note. At this time, a sum of Rs. 4,500 lay to the credit of the first defendant in C.S. No. 42 of 1945 on the file of this Court. On 4th March, 1952, Rajalakshmi applied for attachment before judgment of this amount and attachment was ordered on 5th March, 1952. But, by some mis-

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* C.C.C. Appeal No. 48 of 1957. 18th February, 1960.
(29th day of Magha, 1881—Saka).

chance, the money was paid out to Kanthammal. Thereupon, Rajalakshmi applied to the Court that a direction should be issued to Kanthammal to bring back the money. An order was accordingly made by Panchapakesa Ayyar, J., who directed Kanthammal to bring back that money. Against that order an appeal (O.S. A. No. 146 of 1952) was filed. But that appeal was dismissed. On 29th January, 1954, Ramaswami, J., after hearing both the parties, confirmed the *ex parte* order of attachment that had been made by this Court on 5th March, 1952.

C. S. No. 64 of 1951 was transferred to the City Civil Court where it was numbered as O.S. No. 1694 of 1955. On 1st November, 1955, Mr. Tirumalpad, the Second Assistant Judge of that Court decreed the suit with costs against Kuppuswami Chetti but dismissed it with costs as against Kanthammal. In paragraph 20 of the Judgment, he observed :

> " My finding on Issue 2 is that Exhibit A-1 was transferred in the name of the plaintiff at the instance of the 1st defendant, on the understanding that the plaintiff would realise the money only from the 2nd defendant and that therefore the plaintiff is not entitled to any decree against the 1st defendant on the promissory note Exhibit A-1. The 1st defendant had no objection to a decree being passed against the 2nd defendant."

Here it may be explained that the case of the 1st defendant at the trial was this. She admitted that she had executed the promissory note but the consideration was advanced only to Kuppuswami Chetti. He was the person really liable to pay the amount. The promissory note was deposited in Court in pursuance of an order made by the Court in C.M.P. No. 6932 of 1949 in O.S. A. No. 57 of 1949. When that appeal was compromised and in pursuance of the terms of the compromise, the promissory note was directed to be handed over to Nagiah or a nominee of his, Nagiah owed money to the 1st defendant. He, therefore, directed Ispahani to endorse the promissory note to the plaintiff who would collect the money from the second defendant and pay it over to the first defendant.

After the suit was dismissed as against her, Kanthammal filed I.A. No. 395 of 1956 on the file of the City Civil Court claiming a sum of Rs. 1,000 as compensation from Rajalakshmi under section 95 of the Civil Procedure Code. The learned Assistant Judge dismissed the application. From that order Kanthammal has preferred the present appeal.

Section 95 (1), Civil Procedure Code, provides *inter alia* for two classes of cases in which compensation may be ordered to be paid to a defendant where an attachment has been effected at the instance of a plaintiff. One is that the attachment must have been applied for on insufficient grounds. The other is where (*a*) the suit of the plaintiff fails and (*b*) it appears to the Court that there was no reasonable or probable ground for instituting the suit. It appears from the order appealed from that the case was argued only on the basis that the suit of the plaintiff had failed and that there was no reasonable or probable ground for instituting that suit. Though it does not appear that there was an abandonment of the case in so far as it could be rested on the ground that the attachment had been applied for on insufficient grounds, that aspect of the matter was not argued before that Court. The learned Assistant Judge took the view that on the findings of Mr. Tirumalpad who had tried the suit, it could not be said that the person who had instituted the suit was Rajalakshmi. He, therefore, dismissed the application. The finding of Mr. Tirumalpad was to the effect that Rajalakshmi was not a holder in due course and that the endorsement of the promissory note had been taken in her name in pursuance of an understanding between her and Kanthammal. It was also clear to him that it was Kanthammal herself who was responsible for instituting the suit. It was she who had paid the Court-fee and had engaged counsel and was actually responsible for the institution of the suit. Subsequently, however, Kanthammal and Rajalakshmi fell out and therefore Rajalakshmi decided to press the case against Kanthammal also. Now, if this finding is correct, it would mean that the person who actually instituted the suit was Kanthammal and not Rajalakshmi, and it goes without saying that Kanthammal cannot ask for compensation as against herself. Section 95 (1) (*b*) would, therefore, not apply.

Mr. Srinivasa Ayyangar, the learned counsel for the appellant, however, contended that the word 'institute' which appears in section 95 (1) (*b*) should be given

a more comprehensive meaning. According to him, it must be deemed that this suit was instituted by Rajalakshmi as against Kanthammal at the time she repudiated her understanding with Kanthammal and decided to proceed with the suit against her. According to Mr. Srinivasa Ayyangar, that would be the stage when we may properly say that Rajalakshmi had instituted the suit against Kanthammal. He sought to support this argument by analogies drawn from situations where leave to amend a plaint is granted. I do not think that the word 'institute' occurring in section 95 (1) (*b*) is large enough to contain all this meaning and all these ideas. In order to get the idea which Mr. Srinivasa Ayyangar would have introduced into this clause, it must read somewhat as follows :—

> " The suit of the plaintiff fails and it appears to the Court that there is no reasonable or probable ground for instituting the suit or further prosecuting the same as against a particular defendant."

But those words are not in the section. That being so, the case of the appellant cannot be brought under section 95 (1) (*b*).

The next question is, does it come under section 95 (1) (*a*)? In order to bring the case under section 95 (1) (*a*), it is sufficient to show that an attachment was effected and that the attachment was applied for on insufficient grounds. Here we are confronted by a difficulty. When on 29th January, 1954, Ramaswami, J., passed an order confirming the *ex parte* order for attachment made, he observed :

> " I have heard the main application and I have not the slightest hesitation in coming to the conclusion that the plaintiff petitioner had made out a case for attachment before judgment. This petitioner has filed the suit for a considerable amount and from the pleadings it is clear that she has a substantial case for the defendants to meet. This first defendant has been promising payment to this plaintiff from out of the realisations in the suit C.S. No. 42 of 1945 which has fructified in a decree for Rs. 7,500—and in regard to which the sum of Rs. 7,500 was deposited into Court. There is also no doubt that the first defendant has fallen out with the plaintiff and very bad relations are prevailing and in such circumstances unless this attachment before judgment is given to the plaintiff, who has got a substantial case as against which, on the limited materials before me, the defence seems to be a thin one though a triable one, the respondent would effectually be able to defeat the plaintiff and convert the decree to be obtained by her into a paper decree by withdrawing this Rs. 7,500."

On the other hand, after the trial of the suit and hearing the evidence, the learned Judge of the City Civil Court, in effect, reached the conclusion that Rajalakshmi was only a benamidar for Kanthammal, that it was for the benefit of Kanthammal that the suit was instituted and that it was Kanthammal who found the necessary money for instituting the suit. Now, if this conclusion is correct, it would follow that Rajalakshmi should have made no effort whatever to realise any money from Kanthammal, and if she sought to attach any money of Kanthammal, she was doing so, on insufficient grounds. It was pointed out that the judgment of the City Civil Court was given after full examination of the evidence and on materials that naturally were not placed before Ramaswami, J.

Even if the opinion expressed by Ramaswami, J., could be got over on this ground there would still be one difficulty in the way of Kanthammal, the appellant. Article 181 of the Limitation Act prescribes the period of limitation for applications for which no period of limitation is provided elsewhere and that period is three years. Time would begin to run from the date when the right to apply accrues. Mr. Nambiar contended that the right of Kanthammal to apply accrued at the time the attachment was effected. On the other hand, Mr. Srinivasa Ayyangar contended that the right to apply accrued only after the suit had been disposed of, since it was only then that it was established that the attachment had been applied for on insufficient grounds. Apparently, there is no authority on the point and counsel have not placed any before me. The matter, therefore, is one of first impression and I am inclined to read the words 'when the right to apply accrues' as relating to the time when the attachment was first effected, because it is the attachment that is the foundation of the grievance of the applicant. The attachment was effected in 1952 and the application was made in 1956, that is to say, more than 3 years later. The application therefore is barred by time.

In the result, the appeal is dismissed. There will be no order as to costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

P. Nagarathinam and Bros., Madurai .. *Petitioners**

v.

State of Madras by Deputy Commercial Tax Officer, Madurai .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 6 (1)—*Notification exempting vegetables—Amendment of* 1956 *withdrawing exemption from "yam"—" Yam "—Meaning of—Sales of* senai, sembu, sirukizhangu *and* karunai—*Exemption—Right to—Interpretation of Statutes—Meaning of words—" Sale "—" Dealer "—Sale of vegetables packed in gunny bags—Price of bags included in purchase and sale price—Assessee not dealing in gunny bags—Turnover of gunny bags—Taxability.*

Though in the absence of any statutory definition of " yam " the normal meaning which that expression bears ought to be given to it, when dealing with vegetables with Tamil names for which there are no corresponding English equivalents, the English dictionary meaning of the word " yam " with or without reference to the botanical name, would not be a deciding factor in determining what to the rule-making authority the word " yam " meant, when the notification exempting vegetables from sales-tax and the amendment in 1956, withdrawing the exemption from " yam ", were issued. The Court has really to go by how the word " yam " has been understood in relation to the Tamil words by which the vegetables in question have been known from time immemorial.

No doubt the taxing enactment makes only yam as such taxable when it is sold, and a strict construction would rule out *karunai* or elephant yam. But in normal usage both *senai* and *karunai* have been understood and treated as species of " yam " all along, and this must be held to be what apparently the authorities had in view when they decided that " yam " as such should cease to have the exemption from sales-tax accorded to other vegetables.

Sembu and *sirukizhangu* have never been known to have been described as " yam " and, therefore, the general exemption afforded to vegetables, from which yam is excluded, would apply to sales of *sembu* and *sirukizhangu.*

When there is a sale of an article, such as vegetables packed in gunny bags and the price of the gunny bags is included in the purchase price as well as in the sale price, the container and the contained articles are both sold. Since there is an element of sale when the property in gunny bags was passed from the seller to the purchaser, the turnover of the gunny bags also should be held liable to be taxed. That the dealer did not deal separately in gunnies would not make him anytheless a " dealer ".

Petition under section 12-B (1) of the Madras Gneral Sales Tax Act praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 18th December, 1956 and made in T.A. No. 811 of 1956 preferred against the order of the Commercial Tax Officer, Madurai South, dated 10th June, 1956 and made in Revised Petition No. 37/56-57 (A-3-333/54-55 D.C.T.O., Madurai Town I.)

D. S. Meenakshisundaram and *K. Srinivasan,* for Petitioners.

G. Ramanujam, for the Government Pleader on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—This is an application under section 12-B of the Sales Tax Act to revise the order of the Tribunal. Two questions arise for determination : (1) whether the Tribunal was right in holding that the turnover of Rs. 16,718 was assessable to tax and (2) whether the Tribunal was right in including in the the assessable turnover, a sum of Rs. 7,166-4-0 which was the estimated cost of the gunnies in which the petitioner, assessee, sold vegetables prior to the date of the notification in December, 1954.

The turnover of Rs. 16,718 represented the sale turnover of four items of vegetables. We find it convenient to refer to these vegetables by their Tamil names, the vegetables are indigenous. The turnover was: Sales of karunai (கருணை) Rs. 8,121, sales of *senai* (சேனை) Rs. 4,001, sales of *sembu* (சேம்பு) Rs. 2,968 and sales of *sirukizhangu* (சிறுகிழங்கு) Rs. 1,628. Total Rs. 16,718. The question for consideration is whether these or any of these come within the scope of the expression

* T.R.C. No. 31 of 1957.

3rd December, 1959.
(12th Agrahayana, 188[illegible] Saka.)

'yam' as that expression is used in Notification No. 42 as it was amended in 1956. The effect of that amendment in 1956 was to withdraw from yam the exemption that had been granted to vegetables from sales-tax and make sales of yam taxable.

The tribunal took the view, that in the absence of any statutory definition, the normal English meaning, as can be gathered from the dictionary, should be given to yam, and all the four varieties mentioned above were of the tuberous variety. The Tribunal took the view that each of the four items came within the scope of the word "yam". We quite agree that in the absence of any statutory definition, the normal meaning the expression bears ought to be given to it, but we are here dealing with vegetables with Tamil names, for which really there are no corresponding English equivalents, that is English words which would convey something definite to Englishmen. Therefore the English dictionary meaning of the expression "yam" with or without reference to the botanical names, may not be a deciding factor in determining what to the rule-maker the expression "yam" meant, when the notification in question was issued. We have really to go by how the word "yam" has been understood in relation to the Tamil words by which the vegetables have been known from time immemorial.

On a reference to the Tamil Lexicon we find that the English equivalent for *karunai* (கருணை) is given as elephant yam. That was how *karunai* was understood very much earlier also because in Vol. III of Maclean's Manual of the Administration of the Madras Presidency, at page 288, *karunai* is described as elephant yam. Again in the Tamil Lexicon the word *senai* has been translated as arrowroot, but in the descriptive portion it is referred to as a species of *karunai* (கருணை). The utmost that can be said is that *senai* (சேனை) is another species of yam, whether it is specifically called elephant yam or not.

At one stage we were inclined to accept the contention, that when the taxing enactment makes only yam as such taxable when it is sold, a strict construction should rule out elephant yams, but on further consideration we are of the view, that in normal usage both *karunai* and *senai* have been understood and treated all along as species of yam, which was what apparently the authorities had in view when they decided that yam as such should cease to have the exemption from sales-tax accorded to other vegetables.

In Knight's Dictionary "yam" has been translated as (ஆரவள்ளிக்கிழங்கு), and if that translation were to prevail even *karunai* and *senai* would be out of the scope of the notification; but we prefer to rest our decision on how *karunai* and *senai* have been understood in the Tamil Lexicon and how *karunai* and yam has been understood much earlier in Maclean's Report. *Sembu and sirukizhangu* have never been known to have been described as yam ; in our opinion, there is no real basis for including these two varieties of vegetables in the expression "yam", and therefore the general exemption accorded to vegetables, from which yam was excluded, should apply to the sales of *sembu* (சேம்பு) and *sirukizhangu.*

We think that where indigenous vegetables are referred to there would be more precision if Tamil expressions themsleves are given in the notification, whether or not English words have been used.

We hold that out of the turnover of Rs. 16,718 a turnover of Rs. 2,968 and Rs. 1,628 should be excluded. They represent the turnover of sales of *sembu* and *sirukizhangu*, which, as we have pointed out, should not be brought within the expression of *yam* in the notification.

The second question is, whether the Tribunal was right in holding that Rs. 7,166-4-0, which represented the estimated turnover of gunnies in which the vegetables were sold, was taxable. Learned counsel for the petitioner urged that the petitioner was not a dealer in gunnies as such, because he did not purchase gunnies or sell them. The position, however, was, that he got vegetables by purchase, and those vegetables came packed in gunny bags. It should be obvious that the price of gunny bags was included in the purchase price as well as in the sale price. That the petitioner

did not deal separately in gunnies did not make him any the less a dealer for the purpose of Sales Tax Act. There was a sale of vegetables packed in gunny bags. It has been well settled by decisions of this Court that where there is a sale of an article, the container and the contained article are both sold; and as there was an element of sale when the property in the gunny bags was passed by the petitioner to those who purchsed from him, the Tribunal was right in holding that on the turnover of gunny bags also the petitioner was liable to be taxed.

The order of the Tribunal is modified to the extent indicated above. As neither party has wholly succeeded there will be no order as to costs in this petition.

P.R.N. — *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

The Nadar Bank, Ltd., Madurai, through its Branch Manager .. *Appellant**

v.

The Canara Bank, Ltd., by its authorised Manager, J. Ramadoss Kamath and others .. *Respondents.*

Contract Act (IX of 1872), section 172—Goods under 'open cash credit' system between Bank and its customer—Pledge or hypothecation of moveables——Essentials of a valid pledge—Estoppel on pledgee losing possession of the goods—Applicability of section 178 of the Act.

The agreement between the parties was that the goods are pledged to the Bank as security for the loan, that the borrowers shall, with the previous consent of the Bank, be at liberty to withdraw the goods; provided that the advance value of the goods is paid into the Bank, that the borrowers shall maintain in favour of the Bank a margin of 40 per cent. on the value of the goods and that it was incumbent on the borrowers to furnish statements and returns to the Bank of the current market value and other particulars of the goods left with the Bank as required. The goods were also insured by the borrowers in favour of the Bank.

Held: The juridical relationship between the parties is that of pledgor and pledgee, though the system was termed 'open cash credit' in mercantile practice.

In order to constitute a valid pledge it is essential that there must be delivery of the goods either actual or constructive. Constructive delivery will be adequate to constitute a pledge and it applies to all cases where the pledgor remains in possession of the goods under the specific authority of the pledgee or for limited purposes. The condition that the prior consent of the pledgee was necessary for the pledgor to deal with the goods insures the constructive possession as well as the character of the pledge.

There can be no hard and fast rule that delivery of the keys of the warehouse is essential to secure constructive possession. There cannot also be any rigid delimitation of the purposes for which the pledgor is permitted to retain possession of the goods. The essential test is not the purpose but whether the dominion over the goods pledged is retained and the physical possession or handling of the goods by the pledgor is under the delegated authority of the pledgee or is independent.

Where the possession of the pledgee is not lost and possession may be manual or constructive, a subsequent pledgee even without notice cannot obtain any preference upon a rule of estoppel.

The rule of estoppel can only arise where there is some duty which has not been fulfilled or some omission of that which the other party was bound to do against whom the estoppel is claimed to operate.

Appeal against the decree of the Court of the Subordinate Judge of Madurai in Original Suit No. 155 of 1952.

The Advocate-General (*V. K. Thiruvenkatachari*), *V. V. Raghavan* and *V. Srinivasan*, for Appellants.

Vasanta Pai and *T. Krishna Rao*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This appeal is instituted by the third defendant in the Court below. The Nadar Bank, Ltd., Madurai, against the judgment and decree of the

* Appeal No. 33 of 1956. 21st January, 1960.
(1st Magha, 1881—Saka).

learned Additional Subordinate Judge of Madurai in O.S. No. 155 of 1952, which was a suit instituted by the Canara Bank, Ltd. (Plaintiff) for recovery of a sum of Rs. 21,017-6-0 from two merchants, first and second defendants, which was decreed with costs. As the appeal involves certain interesting questions of law and fact relating to the priority of what are known in mercantile and banking practice as loans upon the security of goods under the "open credit" system, as against similar advances under the "key-loans" system, we shall first set forth the broad and indisputable facts, before formulating the points that arise for our determination.

The facts are that defendants 1 and 2 are members of an undivided Hindu family carrying on business in grains and cereals under the name and style of 'V.M. Sankarapandia Nadar' at Madurai. The Madurai branch of the Nadar Bank Limited (hereinafter termed the appellant Bank) was giving credit facilities to defendants 1 and 2, as regular customers, for the past nearly 15 years. The accounts show that the last cash credit transactions of defendants 1 and 2 with the appellant Bank were closed on 22nd February, 1952. From about 1949, defendants 1 and 2 were also having a current account with the Canara Bank, Limited (hereafter termed the plaintiff Bank). They took "key-loans" from the plaintiff Bank of Rs. 19,500 on 4th January, 1952 and Rs. 14,500 on 20th February, 1952. While matters stood thus, the appellant Bank gave cash credit accommodation to the limit of Rs. 40,000 to defendants 1 and 2 for the year commencing from 1st March, 1952. Under Exhibit B-7, which is a vital document in the case, the cash credit was obtained upon security of goods under the "open credit system" in the following four godowns namely 31, Chintamani Road; 5, Gurusadi lane; 11, Panthadi 7th lane; and 9, Panthadi 1st lane, and also upon the security of certain immovable property (2, Ponnammal Road). On 20th March, 1952, the appellant Bank split the credit facilities of defendants 1 and 2 into two categories, namely, Rs. 20,000 on "open credit" and Rs. 20,000 upon "key-loans" (Exhibit B-15).

On 27th March, 1952, defendants 1 and 2 also approached the plaintiff Bank for a "key-loan" of Rs. 6,600 on pledge of their goods in door No. 9, Panthadi 1st lane (Exhibit A-4). On 4th April, 1952 defendants 1 and 2 took a "key-loan" of Rs. 14,350 from the plaintiff Bank on pledge of goods in Godown 11, Panthadi 7th lane and another godown. Under the "open credit" system and the terms of the agreement Exhibit B-7, defendants 1 and 2 were bound to submit returns of stock periodically, by the week, and they did not do so after Exhibit B-17 dated 2nd April, 1952. On 15th April, 1952, a godown clerk of the appellant Bank is said to have demanded the statement from defendants 1 and 2, who promised to send it the next day. As they did not do so, the clerk (D.W. 1) went and inspected the godowns, and found the doors of Nos. 9 and 11 locked with the locks of the plaintiff Bank. Subsequently, disputes for priority arose between the two Banks, and the appellant Bank also filed a criminal complaint against the first defendant (C.C. No. 1101 of 1952, Sub-Magistrate, Madurai). After the plaintiff filed the present suit, a Receiver was appointed by the Court for sale of the goods in the three godowns, and certain realisations have been made, admittedly far below the value of the goods as originally shown.

Before proceeding to enunciate the points in controversy, it is necessary to have a clear idea of the features of the "open credit" system and the terms of the agreement Exhibit B-7, as well as the features of the "key-loan" system. Exhibit B-7, in particular, is of great importance, for this document and the subsequent returns submitted by defendants 1 and 2 to the appellant Bank in pursuance thereof Exhibits B-10, B-11, B-12, B-13, B-14, B-16, B-17 and B-18, show the true nature of the relationship between the parties, and the character of the advances. Under clause 1 of Exhibit B-7 it is specified that—

> "the goods, produce and merchandise described in general terms in the schedule hereto delivered to the bank under this agreement as security. . . . . are pledged to the bank or are to be deemed to have been so pledged as security to the bank for the payment by the borrowers of the balance due."

Under clause 3 it is specified that—

> "the borrowers shall, with the previous consent of the Bank, be at liberty from time to time to withdraw any of the goods, produce and merchandise for the time being pledged to the Bank,

provided the advance value of the said goods, produce and merchandise is paid into the said account or provided the necessary margin required hereunder is fully maintained."

Under clause 7, it is incumbent on the borrowers to furnish statements and returns to the Bank of the current market value and other particulars of the goods left with them as the Bank may require from time to time, and also that they

"shall maintain in favour of the Bank a margin of 40 per cent on the value of the goods, produce and merchandise."

In addition to this, it is not in dispute that the goods were also insured by the borrowers in favour of the appellant Bank. The name-plate of the appellant Bank was affiexd in the respective godowns, in token of pledge. The record establishes this, and it is further clear from the evidence of the clerk (D.W. 1) that the name-plate was there when he inspected the premises on 2nd April, 1952. On this aspect, we have no doubt that the borrowers (defendants 1 and 2) played the fraudulent game of suppressing the material particulars from the plaintiff Bank, when they obtained advances from that Bank, and also of removing the name-plate evidencing the prior pledges to the appellant Bank, when the Officers of the plaintiff Bank visited the premises, etc. We might here conveniently state that, under the "key-loan" system, on the contrary, the advance is secured by the pledge of goods in the godowns through the simple and effective expedient of putting a lock or seal of the creditor Bank on the godowns, the key or keys thereof being retained by that Bank. But, naturally, this latter system has the profound disadvantage that it immobilises trade or credit. It is no longer possible for the borrower to deal with the goods, even for a restricted purpose, unless he takes possession of the key from the creditor Bank and thus operates upon his stock.

In the lower Court, the trial largely centered around two questions: firstly, whether the security of the goods obtained by the appellant Bank upon its advances, amounted to a pledge in law, or to mere hypothecation of movables. It is not in dispute that, in the latter case, a formal pledge later obtained by the plaintiff Bank under the "key-loan" system will have priority, unless the plaintiff Bank had notice of the prior transactions, and was not acting *bona fide*. The second question was whether the plaintiff Bank was a *bona fide* pledgee without knowledge of the prior transactions, and, if so, whether the appellant Bank was not estopped from contending that it was entitled to priority in respect of the realisations effected by the Receiver. Broadly speaking, those are also the points that arise for determination in the appeal. But a further question has been agitated whether, under such circumstances, the plaintiff Bank would be protected, even if it is not entitled to protection by the operation of any principle of estoppel, because of section 178 of the Indian Contract Act. There are many other matters arising from the oral and documentary evidence, to which our attention has been drawn. For instance, we have the facts relating to the splitting up of the total credit offered by the appellant Bank to defendants 1 and 2, into "open cash credit" for Rs. 20,000 and "key-loan" for the balance of Rs. 20,000 under Exhibit B-15, and the subsequent developments relating to this. We have the facts relating to the inclusion of certain immovable property as mortgage, within the scope of the same advances to the appellant Bank. We have several conflicting statements in evidence about the appearance or disappearance of the name-plates of the appellant Bank in the godowns, the kind of enquiry made by the Manager of the plaintiff Bank, etc. But a great deal of all this merely obscures and confuses the real issues. It is essential to keep the basic facts in mind, and to apply the relevant legal principles to those facts, without being misled by what are really side-issues.

We are unable to see how, in the light of the authorities and the decided cases the agreement under Exhibit B-7 can be interpreted as anything other than document of pledge, with delivery of posession of the goods. We would here emphasise that, in such a matter, the form of the juridical relationship is very important, and that it cannot be divorced from the substance, merely because, in mercantile practice, there is a certain flexibility and freedom for the borrower under the "open cash credit" system. On the contrary, the system seems to have been devised for this very reason; in effect, it secures for the borrower a certain

freedom to deal with the goods, provided a stipulated margin above the value of the advance is maintained, though the formal character of the pledge is throughout preserved. Under the " key-loan " system, the goods are equally secured by pledge, and in the possesslion of the creditor Bank, but there is far less freedom for the borrower to deal with the goods in any manner, even with the express permission of the creditor Bank, and under its authority, as the keys of the godowns are in the physical possession of the Bank. We are unable to see how the effect can be denied to the specific averments in Exhibit B-7 that the entire goods were pledged to the Bank, and that (clause 3) the borrowers can withdraw the goods, even after maintaining the stipulated margin, only "with the previous consent of the Bank ". The weekly statements were also devised to see that the rights of the pledgee were not infringed, while permitting a certain freedom of trade to the pledgor above the margin. The difficulty here arises from a misconception as to the law upon the subject, which appears to be the same both in the United Kingdom and in this country (sections 148, 149, 160, 172, 173 and 176 of the Contract Act). The law is not that the character of the pledge is lost, unless the pledgee retains manual posession of the goods offered as security. On the contrary, firstly, as stated by Erle, C.J., in *Martin* v. *Reed*[1], in order to constitute a valid pledge, what is essential is that there must be a delivery of the article, either actual or constructive, to the pawnee.

"Possession is an equivocal term ; it may mean either mere manual possession, or the mere right to possession."

Also see Chitty on Contracts, Vol II (21st Edition), paragraph 130 at page 73. Constructive delivery will be adequate to constitute a pledge, and it applies to all those cases where the pledgor remains in possession of goods under this specific authority of the pledgee, or for limited purposes In *Maverstein* v. *Barber and others*[2], an advance was obtained from a creditor on deposit of two copies of the Bill of Lading, the borrower fraudulently retaining the third copy, which he used to obtain a subsequent advance from another. The Bill of Lading was recognised as a symbol of property, and its delivery to the plaintiff in the case was held as effective as delivery of the goods themselves. *Reeves* v. *Capper*[3] is a case of movable property (Chronometer) left with the pledgor for use, and it was held that, notwithstanding this fact, the possession was still that of the pledgee. In *North-Western Bank, Ltd.* v. *John Poynter and Son Macdonalds*[4], it was explicitly recognised that a pledgee may redeliver goods to the pledgor for a limited purpose, without thereby losing his rights under the contract of pledge. Finally, reference may be made to *Ex parte Hubbard*[5], which laid down, that the general property in the goods pledged may remar with the pledgor, but that a special property vested in the pledgee, namely, a right of sale of which he might avail when the occasion arises. Learned counsel for the plaintiff Bank (respondent) is aware of the force of these decisions, in which the relevant principles of law are clearly enunciated, and also of the terms of Exhibit B-7. There has been some controversy regarding the manner in which the margin is to be calculated under Exhibit B-7, but this is not really very material, except to determine tne final allocations of the amounts realised by the Receiver, if the appellant Bank is to have priority. The learned Advocate-General for the appellant Bank refers to section 20 (*e*) of the Trust Act, and to the *Explanation* to section 66 of the Transfer of Property Act read with section 68 (1) (*b*), in order to exemplify the types of margin above value of a loan or advance, which the law has recognised for certain purposes. According to the learned Advocate-General, the terms in Exhibit B-7, read along with the subsequent returns, etc., imply that, in the loan or advance is Rs. 100, first and second defendants were bound to maintain stocks to the value of Rs. 166-2-3. Upon another interpretation, that value would be Rs. 140 alone. But, however this might be, the right of the pledgor to sell the goods above the margin, provided the margin is maintained intact, is not an unqualified right, according to the contract between the parties. Learned counsel for the plaintiff Bank stresses that, even according to D.W. 1, the first and second defendants had a right to take out

1. 142 Eng. Rep. 982.
2. (1806-07) 2 Law Reports 38.
3. 132 Eng. Rep. 105.
4. L.R. (1895) A.C. 56.
5. (1886) 17 Q.B.D. 690.

the goods subject to maintaining the margin, under the "open cash credit" system. But, as we have earlier stressed, the very reason for the emergence of this system must have been the greater flexibility it obtained for the borrower to operate upon stock, but the term of condition that, even for this, the prior consent of the creditor Bank was necessary, insures the constructive possession as well as the character of pledge. Mr. Vasantha Pai for the plaintiff Bank (respondent) has submitted an elaborate argument in order to show that, in the cases where redelivery of the pledged goods to the pledgor was recognised as not affecting the character of the pledge, it was always for a special purpose. He refers to delivery of the key of the warehouse in which the goods were stored, as a typical mode (vide *Hilton* v. *Trucker*[1], and *Grigg* v. *National Guardian Assurance Co*[2]. But we are unable to accept that a hard and fast rule can be laid down that delivery of the keys of the warehouse is essential to secure constructive possession. Equally we do not think there can be any rigid delimitation of the purposes for which the pledgor is permited to retain possession of the goods. It may be for personal use, as in *Reeves* v. *Capper*[3]. It may be for a limited purpose, such as obtaining possession of goods under a Bill of Lading returned to the pledgor, so that he might store the articles. It may even be for purposes of sale, and the essential test is not the purpose, but whether the dominion over the goods of the pledgee is retained, and the physical possession or handling of the goods by the pledgor is under the delegated authority of the pledgee, or is independent. The goods may certainly remain in the pledgor's warehouse. As observed in *Martin* v. *Reed*.[4]

> "The warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intentions of the parties."

A certain difficulty may appear to arise in a case like the present, because, under the "open cash credit" system, the pledgor seems to have virtual freedom to sell the goods above the margin, so long as the margin is retained. It may be argued that this feature renders the contract one of simple hypothecation of movables, of the kind described in Mulla's "Transfer of Property Act" (3rd Edition, pages 386, 387) and by the learned Judges of the Calcutta High Court in *Co-operative Hindusthan Bank, Ltd.* v. *Surendranath De*[5]. But the true distinction is that the constructive possession of the pledgee over the goods is specifically secured by the terms of the contract, and that it continues with unabated force throughout. Once this is made clear, it becomes obvious that the freedom of the pledgor to sell above the margin, is still one exercised under the authority of the pledgee, though, in actual mercantile practice, it is this very freedom which the parties take to be the advantage of the system. Consequently, we are of the view, upon the authorities already cited, and discussed, that this is a case of pledge of the goods to the appellant Bank, and not a mere hypothecation of movables.

We must now proceed to the crucial question whether the appellant Bank is estopped from advancing the priority of its pledge. For the purpose of this argument, we shall assume that the plaintiff Bank made the required enquiries, though we cannot claim that the record is particularly satisfactory upon this aspect. The facts appear very much as if there was a race between these two banking institutions for securing custom, with somwhat of a reckless disregard of plain facts evidencing the prior security to another banking institution. Thus, we do not know if the nameplates of the appellant Bank reciting the pledges in their favour were merely ignored by plaintiff Bank's Officers, or they had been conveniently removed by defendants 1 and 2. We are not clear if the prior insurance policies were also totally lost sight of. But, however this might be, we shall assume the *bone fides* of the plaintiff Bank, and the absence of knowledge or notice, and examine this question.

1. L.R. (1888) 39 Ch.D. 669.
2. L.R. (1891) 3 Ch.D. 206.
3. 132 Eng. Rep. 105.
4. 142 Eng. Rep. 982.
5. (1932) I.L.R. 59 Cal. 667.

The learned Subordinate Judge thought that the rule of estoppel operated, mainly upon the authority of certain observations of this Court in *Narasayya* v. *Venkataramayya*[1]. A Bench of this Court observed that when goods were left in the possession of the mortgagor, a wide door was open for fraud, and that when equities between the innocent pledgee and prior mortgagee had to be weighed, the preponderance must be given to the later pledgee because the prior mortgagee, by his omission to secure possession of the goods, had "facilitated the commission of the fraud."

But, such a dictum can only apply where the facts are clear that the prior pledgee, having possession of the goods, lost that possession. Where that possession was not lost, and it is imperative to bear in mind that that possession need not be manual but may be constructive, it is very difficult to see how a subsequent pledgee, even without notice, obtains any preference upon a rule of estoppel. That the pledgee does not release the pledge by handing over a railway receipt or a Bill of Lading to the pledgor for certain purposes is clear from the authority of the *Official Assignee of Madras* v. *The Mercantile Bank of India, Ltd*[2] The entire question of estoppel in such cases was considered by the Judicial Committee in *The Mercantile Bank of India, Ltd.* v. *The Central Bank of India, Ltd.*[3]. Lord Wright refers to the broad rule stated by Ashhurst, J., in *Lickbarrow* v. *Mason*[4], to the effect that:

"Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

Lord Wright then observes that this dictum was too wide, and has been dissented from in several decisions subsequently. He also refers to the observations of Cockburn, C.J., to the effect that if the person in possession under a mere delegated authority, took it upon himself to sell or pledge the goods to a third party, that will not

"divest the owners of his rights as against the third party, however innocent in the transaction the latter party may have been."

The Judicial Committee state that the rule of estoppel can only arise where there is some duty which has not been fulfilled, or some omission of that which the party was bound to do, against whom the estoppel is claimed to operate. Therefore, in the present case, it is really not correct to hold that the plaintiff Bank obtained a priority, even though the appellant Bank had the prior pledge, because the plaintiff Bank had neither notice nor knowledge. That would only be the case where the appellant Bank was bound to do something else, for instance, to publish or declare the charge in its favour to all banks, in some maner made obligatory by law. Here again, the fact that the first and second defendants had a virtual freedom to sell the goods above the margin, ought not to be permitted to confuse the issue. Even that freedom was obtainable only as a permission, in strict law, for the appellant Bank had clearly to retain its constructive possession over the entire stock in the godowns, in order to see that the margin was enforced. In law, the case would be just the same if, under the "key loan" system, the pledgor borrowed the key from the pledgee for opening the godowns, and taking out the goods for restricted purposes.

We therefore hold that the rule of estoppel cannot operate in this case, to deter the appellant Bank from claiming the priority which is otherwise its due.

Learned counsel for the plaintiff Bank (respondent) has urged a final argument based upon section 178 of the Contract Act. He points out that, as observed by Lord Wright in *The Mercantile Bank of India, Ltd.* v. *The Central Bank of India, Ltd.*[3], the Factors Act was enacted in England only to give a limited protection in such cases for unauthorised sale of goods. But the case relied on by him, namely, *Lloyds Bank*

1. (1918) 35 M.L.J. 450 : I.L.R. 42 Mad. 59.
2. (1934) 68 M.L.J. 26 : L.R. 61 I.A. 416 : I.L.R. 58 Mad. 181 (P.C.).
3. (1938) 1 M.L.J. 268 : L.R. 65 I.A. 75 : I.L.R. (1938) Mad. 360 (P.C.).
4. 100 Eng. Rep. 35.

Ltd. v. *Bank of America National Trust and Savings Association*[1], has really no application to the present facts, as that was a case of an agent authorised to sell, who exceeded this authority. Again, *Apparao* v. *Salem Motors*[2], is not helpful upon the present facts, since that was a case to which section 178 of the Indian Contract Act had direct and admitted application. In the present case, the borrowers were not "mercantile agents" at all, either within the definition of section 2 (9) of the Sale of Goods Act or section 178 of the Contract Act. They were themselves the owners of the goods, and were not acting as agents in the customary course of business as agents, either with the appellant Bank or later with the plaintiff Bank, or in any sales of the goods which they might have happened to effect. They were owners pure and simple, and were dealt with as such by the parties. Section 178 of the Indian Contract Act cannot apply to the facts of this case. As observed in *Ah Cheung* v. *Ah Wain*[3], section 178 can be relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent. This argument has therefore no force.

Under the circumstances, we conclude that the transaction is favour of the appellant Bank is a pledge, and that it has a priority which is not affected either by any rule of estoppel or by the application of section 178 of the Indian Contract Act. We find it somewhat difficult to ascertain how precisely the margin has to be calculated in the present case, and admittedly, the appellant Bank has no pledge over 39, Panthadi, and the plaintiff Bank is therefore entitled to exclusive payment in respect of Rs. 5,525-5-0. We find that a sum of Rs. 20,833-14-0 has to be divided between the two Banks, in the ratio resulting from our findings, taking the margin to be that goods worth Rs. 140 must be retained against the loan of Rs. 100; and, accordingly, we direct that the appeal be allowed and the sum available be divided as follows: Rs. 13,889-4-0 in favour of the Nadar Bank (Appellant Bank) and the Canara Bank (Plaintiff Bank), Rs. 6,944-10-0. Each party will bear its own costs in the appeal.

And this appeal having been set down for being mentioned on this day, the Court made the following Order:

Anantanarayanan, J.—After hearing learned counsel on both sides, and in the absence of any data justifying the figure of Rs. 42,085 shown in Exhibit B-17 as the final true value of the stock, we adopt the figure of Rs. 53,000, which is referred to in Exhibit B-35. We desire to add that the oral evidence appears to indicate that there were no withdrawals or releases subsequently, and hence, as far as we can now ascertain from the record, this figure of Rs. 53,000 in Exhibit B-35 must be considered to be the final value and it will accordingly be substituted for the figure of Rs. 42,085 shown in the judgment.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

E. Rajagopalan Chettiar and another .. *Appellants**

v.

Sina Ana Ishack Rowther and others *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 9-A and Madras Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Applicability of scaling down provisions of the former Act to compensation amount deposited with the tribunal under the later Act.

Section 9-A of the Madras Agriculturists' Relief Act, 1938, would apply only to a case where the mortgagor seeks to redeem the mortgage. A right of redemption is an incident to a subsisting mort-

1. L.R. (1938) 2 K.B. 147.
2. (1955) 2 M.L.J. 188 at 195.
3. A.I.R. 1938 Rang. 243.

* S.T.A. No. 4 of 1957.

6th May, 1960.
(16th Vaisakha, 1882—Saka).

gage and could exist only so long as the mortgage on the property remains. In a case where the mortgage property had been taken over by the Government under the Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948, no question of redemption of the mortgage property could arise. Therefore where an erstwhile mortgagor appplies for payment out of the compensa ton amount after making provision for payment to the mortgagee of the estate, no case of redemption can arise and section 9-A of the Madras Agriculturists' Relief Act could not be applied and the debt cannot be scaled down.

Appeal under section 51 (i) of Madras Act XXVI of 1948 against the Order of the Estates Abolition Tribunal at Madurai in O.P. No. 651 of 1955.

K. Parasaran, for Appellant.

T. R. Srinivasan, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal raises the question, whether the provisions of section 9-A of the Madras Agriculturists' Relief Act, 1938 (Madras Act IV of 1938) could be applied to the claim by a mortgagee-creditor to be paid out of the compensation amount deposited in respect of an estate taken over by the Government under the provisions of Act XXVI of 1948 (Abolition Act).

The inam estate of Kusavarungulam was notified and taken over by the Government on 3rd January, 1951, and an advance compensation of Rs. 11,031 was deposited with the Tribunal. The appellants, claiming under an othi executed on 2nd November, 1941, in favour of one Nambi Narayana Chettiar by the 1st Respondent in respect of 1/3rd share in the inam estate, applied for payment out of the sum reserved under the mortgage, namely, Rs. 3,500. The 1st Respondent also applied for payment of his 1/3rd share in the compensation amount less what was payable to the mortgagee. He claimed that he was an agriculturist, entitled to the benefit of Act IV of 1938, that, by the operation of section 9-A of the Act, the debt covered by the othi stood partially discharged, and that he was entitled to be paid out the amount.

Immediately after the othi was executed, the mortgagor, namely, the 1st respondent, obtained a lease of the mortgage properties from the appellant, and was in possession as a tenant till 1st July. 1946, when he surrendered possession of the properties. The 1st respondent claimed that during the period he was in possession as tenant he had paid a certain amount by way of rent which was in excess of 5½ per cent. per annum, on the amount lent and that the excess payment should be taken in reduction of the principal amount due. The Tribunal accepted the contentions of the respondent, and held that, by applying the provisions of section 9-A (9) and crediting the rent in excess of 5½ per cent per annum towards the principal, the debt due on 1st July, 1946 was only Rs. 3,045-8-0, and that, as the mortgagees were in possession of the properties thereafter till the estate was taken over by the Government, there should be a proportionate reduction of the debt. That was ascertained to be Rs. 2,113-13-8. The balance of 1/3rd share of the compensation amount was directed to be paid over to the 1st respondent. The appellants have appealed against the order of the Tribunal, claiming that the mortgage debt is not liable to be scaled down, and that the entire mortgage amount, namely, Rs. 3,500 should have been directed to be paid over to them.

It is not disputed that the 1st respondent is an agriculturist. But it is contended that section 9-A of Act IV of 1938 would apply only to usufructuary mortgages, and its provisions cannot be invoked to scale down the debt due under an anomalous mortgage. Reliance was placed for the contention on *Thirumalpad* v. *Krishnan Nair*[1]. The correctness of that decision was challenged on behalf of the 1st respondent. It is unnecessary, in the view we are taking, to express any opinion about the correctness or otherwise of the decision in *Thirumalpad* v. *Krishnan Nair*[1]. We shall assume that the mortgage in question, though an anomalous one, would come within the scope of section 9-A of the Act.

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1. (1956) 2 M.L.J. 46.

Section 9-A (5) states that, if a mortgagee has been in possession of mortgaged property for a period of 30 years or more, the mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the period of thirty years. The mortgage in the instant case came into existence in 1941, and that rule cannot apply. Section 9-A (3) deals with cases, where a mortgage is less than 30 years old, and it runs :—

> "Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of less than thirty years, the mortgagor shall not be entitled to redeem the mortgage, unless he pays to the mortgagee :—
>
> (1) the difference between the principal amount secured by the mortgage and an amount bearing to principal amount the same proportion as the period during which the mortgagee has been in possession bears to thirty years." *(Rest of the section omitted as unnecessary).*

The terms of the section set out above only enable the debtor to redeem the mortgaged property by paying an amount reduced in proportion to the period during which the mortgagee had been in possession and enjoyment of the property. The language employed is not similar to the one in section 7, which statutorily declared all outstanding interest discharged. If, therefore, the mortgagor does not redeem, the mortgage does not stand discharged. That is possibly for the reason that in an usufructuary mortgage, where the mortgagee is entitled to remain in possession till the entire debt is paid off, a provision for a partial discharge before redemption is unnecessary. This view of the ection has been accepted in a series of decisions. In *Srinivasaraghava Aiyangar* v. *Narasimha Mudaliar*[1], Subba Rao, J., (as he then was) observed that section 9-A was intended to apply only to a case where the mortgagor seeks to redeem the mortgage. This view was accepted in *Visalakshi Achi* v. *Mayalagu*[2]. The decisions in those cases are sought to be distinguished on the ground that they related to a claim for scaling down the rent payable to an usufructuary mortgagee who had granted lease back of the properties to the mortgagor. It is true that the question raised in those cases was with reference to section 9-A (9) of the Act, but we are unable to see any distinction either in principle or in the language employed by the learned Judges, between a case where the benefit is claimed by way of reduction of rent payable or for redemption. In both cases the claim or benefit could be sustained only under section 9-A, and it was necessary to consider to which type of mortgage the section would apply. It is, however, unnecessary to dilate on this aspect of the matter, as that view has been accepted even in cases where no question of payment of rent arose. In Appeal No. 462 of 1950, the suit was laid for recovery of the amount due on an anomalous mortgage, while the mortgagee was in possession. The mortgagor was let into possession under a lease from the mortgagee, but that fact is of no significance, as the claim was for the mortgage money. The mortgagor pleaded that the debt should be scaled down by the application of section 9-A of the Act. The learned Judges held that it was not open to the mortgagor to plead, by way of defence in a suit for sale under section 9-A, that the debt had been discharged partially. In the course of the judgment, Govinda Menon, J., observed :—

> "The appeal can be disposed of on a preliminary question, namely, that section 9-A cannot be availed of by the defendant when a mortgagee brings a suit for sale because the section expressly states that it is applicable only to a suit for redemption by a mortgagor. In a recent case decided by us (A.S. No. 422 of 1950) the question has been considered at some length and we held that the necessary pre-requisite for the application of section 9-A is a suit by the mortgagor to redeem and not by the mortgagee for realisation of the monies by sale."

The learned Judges proceeded to refer to a number of earlier judgments of this Court, taking the same view. Govinda Menon, J., had to consider the matter again in *Thirupathi* v. *Rajagopala Naidu*[3], where he held that in a composite mortgage (simple and usufructuary), where the mortgagee sued for realisation of the amount due by sale on the covenant by the mortgagor to pay the sum, section 9-A of the Madras Agriculturists Relief Act could not be applied, and that that section could come into

1. (1951) 2 M.L.J. 589.
2. (1955) 68 L.W. 630.
3. (1956) 1 M.L.J. 1.

play only where in the case of a usufructuary mortgage the mortgagor sought to redeem. In that case, the lower Court had applied the provision of section 9-A in respect of the mortgage and passed a decree for the reduced amount. In the course of the Judgment, the learned Judge observed :—

"In these circumstances what we have to consider is whether it is open to the mortgagor by a written statement, without filing a fresh suit, to invoke the provisions of section 9-A for the amount being scaled down. In my view, unless the mortgagor tenders the money or deposits the sum in Court, he is not exercising the right to redeem. A mere allegation in a written statement that under section 9-A of the Act the mortgagor is entitled to scale down the amount would not amount to the exercising of the right of redemption. Section 60 of the Transfer of Property Act states that the right conferred under the section is called "a right to redeem" and a suit to enforce it is called "a suit for redemption." The right of redemption can be exercised by the mortgagor only by tendering the money or by depositing it under the provisions of the Transfer of Property Act."

In the present case, there has been no tender or deposit of the mortgage money before the estate was taken over, that is, the mortgage was subsisting on the property.

But even so, it is contended for the respondent, that, when the mortgagor applied to the Tribunal for payment out after providing for payment of the mortgage amount as scaled down, it should be held that he applied for redemption, and that section 9-A would be attracted. The observations of Govinda Menon, J., to which we referred just now, were relied on to show that redemption could be effected by tender or payment, and that when the mortgagor was agreeable to the mortgagee taking the scaled down amount from the compensation money, it should be deemed to be a deposit.

Redemption means buying back the mortgage estate by payment of the money due. Section 60 of the Transfer of Property Act declares the right of the mortgagor to redeem. The right of redemption is an incident to a subsisting mortgage and could exist only so long as the mortgage on the property remains. In a case where the mortgage property had been taken over by the Government, no question of redemption of the mortgage property can arise. Section 3 of the Abolition Act (XXVI of 1948) vests the property on notification in the Government free of all encumbrances. The right of the owner as well as that of the encumbrancer would thereafter be transferred to the compensation money paid under the provisions of the Act. The learned counsel for the respondent argued that the compensation amount should be deemed to be substituted security, and that an application for payment out of the amount would amount to redemption. In *Barhamdeo Prasad* v. *Tara Chand* [1], the Privy Council held that, where the mortgage property was sold by a Court in proceedings to which the subsequent mortgagee was a party, the right of such mortgagee would only be against surplus sale proceeds lying in Court after paying the earlier mortgagee. It was held that the surplus sale proceeds represented security which the mortgagee had under the mortgage.

Section 41 (1) (*b*) (2) of the Abolition Act enables the Government to deduct from the amount deposited any amount due in respect of a mortgage created before the notified date. Section 42 enables the creditors of the owner of an estate to apply for payment out of the compesation monies, the amount due to them. The right created in favour of the mortgagee is for a certain sum of money, and no question of redemption in the sense of buying back of the mortgage property can at all arise. The provision of section 9-A (3) of Act IV of 1938, which applies only to suits for redemption, cannot obviously apply when the mortgagor has not chosen to exercise his right of redemption before the estate was taken over. On the taking over of the estate, the mortgage stood wiped out by operation of section 3 of the Abolition Act and fresh rights were created in favour of the mortgagee.

The learned counsel sought to argue, on the analogy of Order 34, rule 5, which permits a Court-sale under a mortgage decree being set aside before confirmation thereof thus enabling a redemption, that the mortgage should be deemed to subsist

1. (1913) 26 M.L.J. 243 : L.R. 41 I.A. 45 : I.L.R. 41 Cal. 654.

even when the compensation money had been deposited by the Government: Order 34, rule 5, is a specific statutory provision enabling a setting aside a Court-sale on certain terms being complied with. The effect of payment under that rule is a discharge of the mortgage decree. That rule or any principle on which it is based cannot apply to a case where the mortgage property has been taken over by the State. Therefore, when an erstwhile mortgagor applies for payment out of the compensation amount after making provision for payment to the mortgagee of the estate, no case of redemption can arise. Section 9-A (3) could not be applied where there is no occasion for redemption. The appellant would, therefore, be entitled to be paid out the full amount of Rs 3,500. The appeal is allowed with costs.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras, represented by the Commissioner of Agricultural Income-tax, Board of Revenue, Madras .. *Petitioner**

v.

Balmadies Plantations Limited, Naduvattam P. O., Managing Agents, Managing Agencies Private Ltd., P. B. 267, Oriental Buildings, Armenian Street, Madras .. *Respondent.*

Madras Plantations Agricultural Income-tax Act (V of 1955), *sections* 5 (e) *and* 5 (l)—*Construction and scope—Bonus paid to employees other than workers, that is, to persons designated as manager, superintendent, etc.—Payment satisfying condition laid down in section* 5 (e)—*Deduction of—Permissibility—Interpretation of statutes—General and special provisions—Rule of construction.*

Section 5 (*l*) of the Madras Plantations Agricultural Income-tax Act does not operate as a statutory bar to the deduction of payments of bonus to employees other than statutory *workers*. Such payments to employees other than statutory workers constitute an item of expenditure, and if such a payment satisfies the test of section 5 (*e*) of the Act, namely that it was expended wholly and exclusively for the purposes of the land, it must be allowed as a deduction. To hold otherwise—that no bonus payment other than the payment to the class of employees designated ' workers ' that is, as defined in section 2 (*k*) of the Plantations Labour Act (Central Act LXIX of 1951)—which would exclude managers or superintendents—would involve reading into section 5 (*l*) something which is not there. There is no justification for so reading section 5 (*l*) or to interpret it to lead to that result.

The normal rule of construction of statutes is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

While section 5 (*e*) deals with all expenses, section 5 (*l*) deals with specified classes of expenditure What falls within the scope of section 5 (*l*) cannot be dealt with under section 5 (*e*) of Madras Act V of 1955.

The statutory concept of " worker " excludes a large class of employees on land, and the Legislature should have been fully aware of that position. The Legislature should also have been aware of the fact that bonus is claimed by and paid to other employees besides the limited class of employees included in the statutory definition of worker in section 5 (*l*). There is, therefore, no real basis in the scheme of the Act to warrant the view that no payment of bonus to an employee other than the payment to a " worker " could ever be a permissible item of expenditure which could be deducted in computing the assessable agricultural income of an assessee.

Craies on Statute Law, 5th edition, page 205, referred to.

Petition under section 54 (1) of the Madras Plantations Agricultural Income-tax Act, 1955 (Madras Act V of 1955) praying the High Court to revise the Order of the Agricultural Income-tax Appellate Tribunal, Madras, dated 11th December, 1956 and made in A.T.A. No. 33 of 1956. (A.I.T.A. No. 44/56-57, Assistant Commissioner, Agricultural Income-tax, Ootacamund, against G.I.R. No. 5-b/55-56, Agricultural Income-tax Officer, Gudalur).

* T.R.C. No. 32 of 1957 and Tax case (Rev.) Nos. 20, 23, 46, 47, 51 53, 56 and 57 of 1959. Revision Nos. 13, 16, 26, 27, 31, 33, 36 and 37 of 1959.

27th January, 1960. (7th Magha, 1881—Saka).

The Advocate-General (*V. K. Thiruvenkatachari*), *G. Ramanujam*, for the Government Pleader (*K. Veeraswami*), for Petitioner.

V. Sethuraman, *S. Padmanabhan*, *O. T. G. Nambiar*, for *Messrs. King* and *Partridge*, *S. Govindan Nair*, *Kunjithapadam*, *V. Balasubramanian* and *M. Ranganatha Sastri*, for Respondent.

The Order of the Court was made by

Rajagopalan, J.—Since an identical question of law arises for determination in each of these applications, preferred by the State under the Madras Agricultural Income-tax Act (V of 1955), to which we shall refer in the rest of this judgment as the Act, we shall dispose of the applications by a single judgment. In each of these cases the assessee claimed that the sum he paid his employee—in some cases that employee was designated the manager and in others as superintendent—as bonus in the relevant year of account was a permissible deduction under section 5 (*e*) of the Act. That claim was upheld by the Tribunal, and the correctness of that decision was challenged by the Department. The main contention of the learned Advocate-General who appeared for the petitioner, Department, was that section 5 (*l*) of the Act was the only statutory provision under which the assessee was entitled to deduction of payments of bonus, and, as admittedly the claim of the assessee in each of these cases did not fall within the scope of section 5 (*l*) of the Act, the claim of the assessee should be negatived.

The relevant sub-sections of section 5 of Act V of 1955 are:

"Section 5. The agricultural income of a person shall be computed after making the following deductions namely :—

* * * * * *

(*e*) any expenditure incurred in the previous year (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the land ;

* * * * * *

(*l*) any sum paid to a worker as defined in the Plantations Labour Act, 1951 (Central Act LXIX of 1951), as bonus for services rendered where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus :

Provided that the bonus is of a reasonable amount with reference to—

(i) the wages and conditions of service of such worker ;

(ii) the income from the land in the year in question ; and

(iii) the general practice in the land :

Provided that no deduction shall be made under this section if it has already been made in the assessment under the Indian Income-tax Act, 1922 (Central Act XI of 1922), or is allowable in assessing a person to tax under that Act."

To understand the scope of the statutory expression "worker", we have to refer to the relevant provisions of the Plantations Labour Act, LXIX of 1951. Section 2 (*k*) of Act LXIX of 1951, provides the statutory definition of worker :

"Worker means a person employed in a plantation for hire or reward whether directly or through any agency to do any work skilled, unskilled, manual or clerical but does not include—

(*a*) a medical officer at the plantation ;

(*b*) any person whose monthly wages exceed Rs. 300, or

(*c*) a person employed in plantation primarily in managerial capacity notwithstanding that his monthly wages do not exceed Rs. 300."

Plantation itself was defined in section 2 (*f*) of Act LXIX of 1951 :

"Plantation means any land used or intended to be used for growing tea, coffee, rubber, or cinchona which admeasures twenty-five acres or more and whereon thirty or more persons are employed, or were employed on any day of the preceding twelve months, and in any State where the provisions of this Act have been applied by notification under sub-section (4) of section 1 to any other class of plantations, means also any land used or intended to be used for growing the plant mentioned in such notification and whereon thirty or more persons are employed, or were employed on any day of the preceding twelve months."

The definition of "plantation" in Madras Act V of 1955 differs substantially from that in Central Act LXIX of 1951. Section 2 (*r*) of Madras Act V of 1955 defines plantation :

> "Plantation means any land used for growing all or any of the following, namely, arecanut, tea, coffee, rubber, cinchona or cardamom."

Apart from the statutory requirement of the employment of thirty or more persons before a given piece of land is treated as a plantation for the purposes of Act LXIX of 1951, the position is, that while the land on which cardamom and arecanut are grown will be plantations within the meaning of Madras Act V of 1955, they will not be plantations within the meaning of Central Act LXIX of 1951, and even the labourers working on lands on which cardamom and arecanut are grown will not be workers within the meaning of section 5 (*l*) of Act V of 1955. Those employed in work on any other class of agricultural or horticultural land will also be obviously outside the scope of "workers", as that expression has to be understood in the context of section 5 (*l*) of the Act V of 1955.

To bring the claim for deduction within the scope of section 5 (*l*) of the Act, what the assessee has to establish is: (i) that the payment was made in the relevant year of account, (ii) that the payment was to an employee who is a worker, as defined by Central Act LXIX of 1951, (iii) that the payment was made as a bonus, (iv) that the payment as bonus was for services rendered by the employee, the recipient of the bonus ; and (v) the amount so paid as bonus would not have been payable to that employee as profits or dividend. In addition, the assessee has to establish: (1) that the payment satisfied the test of reasonableness which the First Proviso to section 5 (*l*) prescribed, and (2) that the terms of the Second Proviso to section 5 (*l*) did not apply.

What follows from the second of the requirements listed above should be clear. No payment to an employee other than a worker as defined by Act LXIX of 1951 will fall within the scope of section 5 (*l*) of the Act, even if all the other requirements of section 5 (*l*) are satisfied. Even of the employees working in a plantation as defined by the Central Act LXIX of 1951, some stand excluded by the definition of worker in that Act. The employees engaged in all other classes of agricultural and horticultural lands will not be workers either within the meaning of section 5 (*l*) of the Act. Act LXIX of 1951 would also exclude labourers employed on land used for growing tea, coffee, rubber or cinchona, where either the land is less than 25 acres in extent, or where less than thirty persons are employed. Payments of bonus to these classes of employees fall outside the scope of section 5 (*l*) of the Act, because they are not within the statutory concept of workers.

It should be obvious that but for the specific provision in section 5 (*l*) of the Act, even payment of bonus to a worker within the scope of section 5 (*l*), which satisfied the test of section 5 (*e*) that it was expended wholly and exclusively for the purposes of the land, would have been a permissible deduction under section 5 (*e*) of the Act. But what falls within the scope of section 5 (*l*) cannot be dealt with under section 5 (*e*) of the Act. Section 5 (*e*) deals with all expenses, while section 5 (*l*) deals with speified classes of expenditure. The normal rule of construction is in the words of Romilly, M.R. in *Pretty* v. *Solly*[1]:

> "The general rules which are applicable to particular and general enactments in statutes are very clear. The only difficulty is in their application. The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter taken in its most comprehensive sense would overrule the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

(*See* Craies on Statute Law, 5th edition, page 205).

As what is included in section 5 (*l*) will stand excluded from the scope of section 5 (*e*) of the Act, we have to verify what is it that falls within the ambit of section 5 (*l*). The contention of the learned Advocate-General was that section 5 (*l*) is a specific

1. (1859) 26 Beav. 606 at 610 : 53 E.R. 1032.

legistlative provision for deduction of bonus payments, and that no payment of bonus that fails to satisfy any of the requirements of section 5 (*l*) could be dealt with under section 5 (*e*). We are unable to accept that contention, which involves the basic assumption, that the subject-matter of section 5 (*l*) of the Act is all expenditure by way of payments of bonus. The learned Advocate-General was, of course, right when he pointed out that, when a deduction is claimed under section 5 (*l*), and the claim is rejected on the ground that the payment fails to satisfy, for example, the test of reasonableness imposed by the First Proviso to section 5 (*l*) the claim could not be considered under section 5 (*e*) of the Act. But we are unable to accept as correct his further submission, that the statutory requirement that the payment should be to a worker is just one more of the tests to be satisfied, and that it is not a factor to be taken into account any more than the test of reasonableness in deciding what is the essential subject-matter, the pith and substance, of the legislative provision in section 5 (*l*) of the Act. As we read section 5 (*l*) in the context of the Act, the subject-matter of that statutory provision is in the words of the sub-section itself, "sums paid to a worker as bonus for services rendered" or at least sums paid to a worker as bonus; worker, of course, being understood in the terms of Act LXIX of 1951. As we pointed out, the statutory concept of worker excludes a large class of employees on land, and the legislature should have been fully aware of that position. The Legislature should also have been aware of the fact, that bonus is claimed by and paid to other employees also besides the limited class of employees included in the statutory definition of workers in section 5 (*l*) of the Act. We find no real basis in the scheme of the Act to justify the contention, that the Legislature in eff ct intended to Legislate that no payment of bonus to an employee other than the payment to a worker could ever be a permissible item of expenditure which could be deducted in computing the assessable agricultural income of an assessee.

The learned Advocate-General invited our attention to the analogous provisions of the Income-tax Act. Section 10 (2) of the Income-tax Act provides :

"Profits or gains shall be computed after making the following allowances, namely :—

* * * * * *

(*x*) any sum paid to an employee as bonus or commission for services rendered where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission :

Provided that the amount of bonus or commission is of a reasonable amount with reference to

(*a*) the pay of the employee and the conditions of his service ;

(*b*) the profits of the business, profession or vocation in the year in question ; and

(*c*) the general practice in similar businesses, professions, or vocations ;

* * * * * *

(*xv*) any expenditure not being an allowance of the nature described in any of the clauses (*i*) to (*xiv*) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

Section 10 (2) (*xv*) of the Income-tax Act in substance corresponds to section 5 (*e*) of Act V of 1955, while section 10 (2) (*x*) of the Income-tax Act is akin to section 5 (*l*) of Act V of 1955. The scope of section 10 (2) (*x*) of the Income-tax Act is much wider than that of section 5 (*l*) of the Act (V of 1955), because section 10 (2) (*x*) of the Income-tax Act takes in all employees, and also payments both by way of bonus and as commission for services rendered. We would find it difficult to accept the contention that payment of commission for services rendered by a person other than an employee, which would of course be outside the scope of section 10 (2) (*x*), could not be dealt with under section 10 (2) (*xv*) of the Income-tax Act, even if the test prescribed by section 10 (2) (*xv*) is satisfied.

To come back to the question, what was the subject-matter of section 5 (*l*) of the Act, it is certainly not all payments to an employee or even all payments to the limited class of employees, the workers, but payments to workers by way of bonus. There was no specific statutory provision in the Act to deal with payments by way of bonus to other class of employees and in the absence of any specific statutory provision, the general provision, section 5 (*e*) of the Act should apply to decide whether such pay-

ments constitute admissible deductions. The acceptance of the contentions of the learned Advocate-General, that no bonus payment other than the payment to the limited class of employees designated workers would be a permissible item of deduction, would involve reading section 5 (*l*) of the Act as if it ran :

"Any sum paid (to an employee) as bonus for services rendered, provided that no deduction shall be made if the payment was to an employee other than a worker as defined by Act LXIX of 1951."

We can see no justification for so reading section 5 (*l*) of the Act or interpret it to lead to that result. In our opinion section 5 (*l*) of the Act does not operate as a statutory bar to the deduction of payments of bonus to employees other than statutory workers. Such payments to employees other than statutory workers constitute an item of expenditure, and if that satisfies the test of section 5 (*e*) of the Act, it must be allowed as a deduction.

The correctness of the finding of the Tribunal, that the test prescribed by section 5 (*e*) of the Act, that it was expenditure wholly and exclusively laid out or expended for the purposes of the land was satisfied in each of these cases, was not challenged before us. We agree with the Tribunal that in each of these cases the assessee was entitled to deduct these items of expenditure under section 5 (*e*) of the Act in computing his assessable agricultural income.

These petitions fail and are dismissed with costs. In each of these petitions other than T.C. Nos. 53 and 56 of 1959, in which the respondent did not enter appearance, the respondent-assessee will be entitled to his costs. Counsel's fee Rs. 100.

P.R.N. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special ORIGINAL Jurisdiction)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

The Management of Thambi Motor Service, Salem .. *Petitioner**

v.

The Presiding Officer, Labour Court, Coimbatore and another.. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 10 (1)—*Reference under—Powers of Government to amend or add to—Extent of—Amendment not merely adding to but superseding original reference—Competency—Jurisdiction of Tribunal to entertain or proceed upon—Validity of award—Constitution of India* (1950), *Article* 226—*Question of fact if can be gone into or urged.*

Where the appropriate Government have made a reference under section 10 (1) of the Indusrial Disputes Act, they have no power to cancel or to amend or modify the same. But, at the same time, the Government have got the power to make an amendment by which new items are added to the disputes already referred to a Tribunal. The inclusion of additional items to the matters to be adjudicated upon by an Industrial Tribunal would not be the exercise of a power to amend an existing reference but rather of a power to make a reference in respect of other disputes which the Government cannot do, though there can be modification of the terms of the original reference.

State of Bihar v. *D. N. Ganguly*, A.I.R. 1958 S.C. 1018, followed.

S. I. Est. Labour Relations Organisation v. *State of Madras*, (1954) 1 M.L.J. 518, applied.

Where the original dispute referred to the Labour Court was "what retrenchment compensation, if any, are the workers *A* and *B* entitled to ?" and subsequently on representations made by the Labour Union, the Government amended the reference, and the dispute referred as amended was "whether the retrenchment of cleaners *A* and *B* was justified and to what relief they are entitled, and to compute the relief in terms of money, if it can be computed ?";

Held : (1) that the first reference having proceeded on the basis that the retrenchment of the workers was in order—legal and justified—and the second reference having directed the Tribunal to entertain a dispute touching the justification and legality of the order of retrenchment, this was clearly a case of a modification of the original order of reference and not of adding a new item, and hence was incompetent, with the result that the Tribunal had no jurisdiction to entertain or proceed upon the amended reference and the award based on it must be set aside ;

(2) that the two references were plainly inconsistent with each other, and, in substance, the second reference not merely added to but superseded the first, and the second reference must be held to be *ultra vires*, and could not be given effect to.

* W.P. No. 320 of 1958. 10th December, 1959. (19th Agrahayana, 1881—Saka).

A pure question of fact cannot be seriously put forward in the High Court in proceedings under Article 226 of the Constitution of India.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 74 of 1957, on the file of the Labour Court, Coimbatore and quash the award therein, dated 26th February, 1958 and published in Supplement to Part I, *Fort St George Gazette*, dated 26th March, 1958 and printed in pages 5 to 7 thereof.

M. R. Narayanaswamy, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*) and *P. Ramachandran of Messrs. Row* and *Reddy*, for Respondents 1 and 2.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *certiorari* to quash an order of the Labour Court, Coimbatore, passed in an industrial dispute between the petitioner —the management of Thambi Motor Service, Salem and the workers.

The industrial dispute related to matters concerning two workers, Irrusappan and Manickam. The workers had been in the service of the petitioner-management from about 1951. While so their service had been terminated in July, 1955, for alleged misconduct. Thereafter the Union raised an industrial dispute which in the first instance went before the Labour Officer for conciliation. As a result of the good offices of this Official a settlement was brought about under which the two workmen were re-entertained in service as and from 21st September, 1956. This agreement specifically mentioned that the workers were taken back without the benefit of back wages. Subsequently these two workers were retrenched from service. The propriety of this retrenchment was challenged by the Union who raised a dispute and as no conciliation could be effected by the Labour Officer the matter was placed before the Government.

On 31st October, 1957, the Government of Madras, referred the industrial dispute between the petitioner-management and the second respondent Union for adjudication to the Labour Court, Coimbatore. The Annexure to this Government Order set out the dispute in the following terms. "What retenchment compensation, if any, are the workers Irusappan and Manickam entitled to?" From the terms of the reference it would follow that the only point for adjudication by the Labour Court was the quantum of compensation to which the workers would be entitled, which could only be on the basis that the retrenchment was justified. This reference was received by the Labour Court on 6th November, 1957, and by notice, dated 10th November, 1957, the management and the Union were directed to file their statements.

When the Union was apprised of the terms of the reference, a communication was addressed by it to the Government on 9th November, 1957, requesting that Government might consider their previous reference and modify the same so as to enable the Labour Court to adjudicate, upon the propriety or justification of the retrenchment, which their original reference precluded the Labour Court from doing. The Government, however, by their order, dated 15th November, 1957, informed the Union that they saw no reason to modify the terms of the reference, and that their original reference would stand. The Union, however, did not drop the matter but made a further representation on 19th November, 1957, to the Government. In view of the correspondence with the Government, the Union did not file the statements which were required to be filed by the Labour Court and the matter was thus dragging on. Finding that the representations to the Secretary to the Government did not result in a modification of the terms of reference, the Union addressed a communication straight to the Labour Minister on 18th November, 1957. This bore fruit and on 10th December, 1957, the reference to the Labour Court was amended and the dispute referred as amended was directed to read : "Whether the retrenchment of cleaners, Irusappan and Manickam was justified and to what relief they are entitled and to compute the relief in terms of money if it can be so computed?"

The union filed their claim statement on 23rd December, 1957 and as by that date the reference had been amended the points urged related mainly to the justification or the propriety of the retrenchment.

In the counter-statement filed by the management, the legality of the order of the Government in amending the reference already made was challenged, and it was submitted that the same was beyond the jurisdiction of the Government on a proper interpretation of section 10 of the Industrial Disputes Act. There were other points raised about the merits of the petitioner's claim to which I shall advert later.

The Labour Court considered this question of the jurisdiction of the Government to amend the reference originally made and overruled the objection of the management. The first point urged by the learned counsel for the petitioner was that the order of the Labour Court overruling the objection was erroneous, and this was the principal point that was argued before me in this petition. In reaching the conclusion adverse to the petitioner, the Labour Court had relied upon a decision of the Punjab High Court, *The Textile Workers Union, Amritsar* v. *State of Punjab*[1], for the position that the power of Government to cancel, amend or modify a reference already made was on the terms of section 10 plenary. Learned counsel for the petitioner pointed out that this decision of the single Judge of the Punjab High Court had been expressly overruled by the Supreme Court in *State of Bihar* v. *D. N. Ganguly*[2]. In this last decision their Lordships of the Supreme Court have expressly held that section 21 of the General Clauses Act which permits the inference of a power to add to, amend, or vary, or rescind any notification, order or rule could not be applied to a power of the sort conferred by section 10 (1) of the Industrial Disputes Act. It is unnecessary to set out the reasons upon whch the decision of the Supreme Court is rested, but it is sufficient to say that they have denied any power to Government not merely to cancel but also amend or modify a reference once made under section 10 (1) of the Act.

In paragraph 21 of their judgment, however, their Lordships have excepted from the scope of their decision cases where the Government do not modify but add to a reference already made. Their Lordship's attention had been drawn to the decision of of a Bench of this Court in *S. I. Est Labour Relations Organisation* v. *State of Madras*[3] where this Court had upheld the validity of an amendment of a reference by which new items were added to the disputes which had always been referred to a Tribunal. Venkatarama Ayyar, J., dealing with the objection based on the absence of a power in Government to modify a reference already made said:

"The objection is one of form and is without substance. It would have been open to the Government to make under section 10 an independent reference concerning any matter not covered by the previous reference. That it took the form of an amendment to the existing reference and not an additional reference is a mere technicality which does not merit any interference in these proceedings."

It is obvious that the inclusion of additional items to the matters to be adjudicated upon by an Industrial Tribunal would be not the exercise of a power to amend an existing but rather of a power to make a reference in respect of other disputes. This judgment of this Court was expressly referred to with approval by the learned Judges of the Supreme Court.

The question, therefore, for consideration now is whether the amendment effected by the Government Order of 12th December, 1957, is really an additional reference or is in truth and substance a variation or modification of the previous reference. Before dealing with this matter I consider it convenient to refer to the precise facts which were brought up for consideration by this Court in *S.I. Est. Labour Relations Organisations* v. *State of Madras*[3]. The original order of reference was dated March, 1952, and it referred for adjudication 8 items of disputes in relation to the staff and 6 items of dispute in relation to workers. The reference was amended in June, 1952. There was no variation as regards the 6 items of dispute with the workers, Only two items of dispute—relating to gratuity and bonus—which were originally treated as disputes between the management and the staff were directed to be adjudi-

1. A.I.R. 1957 Punj. 255.
2. A.I.R. 1958 S.C. 1018.
3. (1954) 1 M.L.J. 518.

cated as disputes between the management and the workers also. Certainly this would be in the nature of a reference of an additional dispute regarding the workers and would not constitute any modification of an existing reference in the sense in which that expression is used in the judgment of the Supreme Court. There were three more changes effected in the items of dispute referred. In the original order of reference there were two items of dispute between the management and the staff, which were numbered as 6 and 7. These were deleted from among the points of dispute between the management and the staff, but were stated to be disputes between the management and the workers. The question as to whether the cancellation or deletion of the dispute so far as regards the staff was concerned was not challenged before this Court, and this the staff alone could do. In so far as the items were referred for adjudication between the management and workers, they would be certainly new items which were added and so well within the power recognised by the Supreme Court. Lastly a new item of dispute as regards the terms of employment of maistries was added as part of the dispute between the workers and the management. This again would fall within the same principle. The above analysis would show that in *S.I.Est. Labour Relations Organisation* v. *State of Madras*[1], there was no modification of the terms of any reference, but only an addition of new items of disputes referred for adjudication.

The question to be considered, therefore, is whether the amendment effected by the reference dated 12th December, 1957, constituted a modification of the original reference of October, 1957. Learned counsel for the petitioner submitted that the original order of reference proceeded on the basis that the retrenchment of the workers was justified, whereas this position was negatived by the second order of reference, and that consequently it fell within the prohibition laid down by the Supreme Court in the decision already cited. I consider this argument well founded and I accept it. Learned counsel for the respondent urged that the second reference was really a case of an addition of a new item falling within the exception on which the decision of the Bench of this Court was rested. There is no doubt that if the first matter referred for adjudication did not touch any dispute relating to retrenchment the addition of such an item would be within the power of the State Government. But the facts here were different. The first reference did include a dispute regarding retrenchment. It required the Tribunal to assess the compensation due to the workers consequent on the retrenchment. This could only be done if the retrenchment was justified. If therefore the first reference directed the Tribunal to proceed on the basis that the retrenchment was in order legal and justified and the second order directed the Tribunal to entertain a dispute touching the justification and legality of the order of retrenchment, it appears to me that this could not but be a modification of the original order of reference.

The same point might be viewed from another angle. On the first reference the Tribunal was bound to compute the retrenchment compensation due to the workers by applying the provisions of section 25—length of service, etc., to the facts of the case. The Tribunal would not, however embark on this enquiry if on the second reference it found that the retrenchment was unjustified. The relief that could be awarded to the worker would be entirely different. This would plainly demonstrate that the two references were or would be inconsistent with each other, and that in substance the second reference not merely added to but superseded the first. I am, therefore, clearly of the opinion that the amendment effected by the reference of December, 1957, could not be given effect to unless the Government were vested with a power to cancel, modify or amend the first order of reference and as it is conceded that the Government did not have such a power the reference in question must be held *ultra vires*. This might suffice to set aside the award of the Tribunal. But in view of the fact that other points have also been urged before me, I shall record my findings on them.

The first of these points was that the Tribunal erred in computing the services of the retrenched workers as from the date of their original entertainment in service,

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1. (1954) 1 M.L.J. 518.

and not from September, 1956, when on the mediation of the Labour Officer they were re-entertained or re-employed. It is conceded that in the compromise which resulted in the re-employment of the workers, there was no clause which denied to the workers continuity of service whereas the right to back wages and allowance was expressly negatived. The Labour Court has on a consideration of this circumstance as well as those surrounding the conciliation, reached the conclusion that continuity of service was not intended to be denied to the re-employed workers. I see no reason to question the correctness of this finding of the Tribunal. But even if the Tribunal committed any error it was not of such a nature as to be interfered with by this Court in proceedings under Article 226 of the Constitution.

If this finding stood it is conceded that the rule laid down in section 25-G of the Industrial Disputes Act that the retrenchment should be of those who had come last would have been violated. There was also some argument about the merits of the conduct of the workers which led to the termination of their services. But this is wholly a question of fact and cannot be seriously put forward in this Court.

In view, however, of my conclusion on the first point about the incompetency of the reference, I hold that the Tribunal had no juridiction to entertain or proceed upon the reference dated 12th December, 1957 and its award based on it must accordingly be set aside.

The petition succeeds and the rule *nisi* is made absolute. The award of the Tribunal is set aside. No order as to costs.

P.R.N. — *Petition allowed. Rule made absolute. Award set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Seeni Ammal, *In re* .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 417 and 439—Revision petition by private party against the order of acquittal —Notice to Public Prosecutor at the stage of admission of petition—Public Prosecutor, if satisfied, may prefer an appeal against the acquittal—Procedure suggested in the interests of justice.

It is permissible for a party to appeal by Special Leave aginst the acquittal under section 417, Criminal Procedure Code, though he is a private party and not the State. But if the party prefers, instead to come by way of revision under section 439, Criminal Procedure Code, it would be available for such a proceeding to be instituted within two months of the date of acquittal. It will then be possible for the High Court to order immediate notice to the Public Prosecutor for the State even before admitting the revision petition. The Public Prosecutor could peruse the records on such notice and satisfy himself whether it is in the interests of justice to press for interference with an acquittal. In that case he may institute a regular appeal against the acquittal. The Court may then, in the interests of justice, deal with the appeal and also convict the accused in appropriate cases.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Additional Sessions Judge of the Court of Session of the Tirunelveli Division in S.C. No. 136 of 1959.

S. Mohankumaramangalam, N. Natarajan and *S. Ramaswami*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the State.

The Court made the following

ORDER.—This is a revision petition preferred against the acquittal of the accused in S.C. No. 136 of 1959 on the file of the learned Additional Sessions Judge of Tirunelveli. That prosecution related to the murder of a man named Ramaswami Naicker who undoubtedly received gunshot injuries at the spot of offence (Nadu street in Varaganur Village) at about sunrise on 17th April, 1959, and succumbed to those injuries. The revision proceeding is preferred before us by Seeni Ammal (P.W. 1), the wife of the victim, under section 439, Criminal Procedure Code. In view of the importance of clarifying the procedure with respect to petitions of this

* Crl.R.C. No. 295 of 1960. (Crl.R.P. No. 291 of 1960.) — 27th April, 1960. (7th Vaisaka, 1882 Saka).

character, particularly in the context of the restriction of our powers under section 439 (4), Criminal Procedure Code, we have directed the issue of notice to the learned Public Prosecutor for the State, and heard both the learned Public Prosecutor and learned counsel for the revision petitioner extensively, even at the present stage of admission of this petition.

Before proceeding into the facts of the case to any extent it is necessary to make clear certain implications of the situation itself. The growth of criminal jurisprudence has been a progressive substitution of the idea that grave crime primarily affects the social fabric, since it imperils that fundamental security of person and property without which society is impossible, for the idea that such crime is a wrong inflicted upon individuals, to be redressed by vengeance. Historically speaking it is only gradually that the *lex talionis* or the rule of an eye for an eye and a tooth for a tooth, has been superseded by an impersonal scheme of punishment for grave crime, the prosecution for which is primarily the concern of the agencies of the State, precisely as the detection of which is the concern of one limb of the administration, the Department of Police. But, even at present, there are anomalies. The machinery of the State, adequate as it is for most cases, may function imperfectly or eccentrically in a paricular case. That is why, under the Criminal Procedure Code as it stands today, even a prosecution for a grave crime may be as a result of a complaint preferred by a private party. Further, where the accused has been improperly acquitted in a prosecution for grave crime, it is again beyond controversy that the State should be primarily concerned, for the fact that a guilty person escapes the retribution of justice, even where the material for convicting him is true and adequate, is one which affects public interest and the welfare of the State, equally with a wrongful conviction. Nevertheless, it may happen that an erroneous acquittal does not always lead to a prompt action by the agencies of the State, it may be for a variety of reasons. Hence, in section 417 (3), Criminal Procedure Code, as now enacted (Amendment Act XXVI of 1955), provision has been made for the private complainant to obtain Special Leave to appeal from an acquittal. But, an appeal from an acquittal and a proceeding in revision differ in this essential respect. Even if we are fully convinced that the acquittal was erroneous, and that there has been a miscarriage of justice, our powers under section 439 (4), Criminal Procedure Code, are circumscribed, in the sense that while we might certainly order a retrial of the case, we cannot, in the exercise of revisional jurisdiction, convert a finding of acquittal into one of conviction, and pass an appropriate sentence.

In *Harihar* v. *The State of West Bengal*[1], their Lordships of the Supreme Court laid down the law following *D. Stephen* v. *Nosibolla*[2], that the revisional jurisdiction conferred on the High Court under section 439, Criminal Procedure Code was not to be lightly exercised, particularly when it is invoked by a private complainant against an order of acquittal, against which the Government also has a right of appeal under section 417, Criminal Procedure Code. In such cases, it must be established clearly that the interests of public justice require interference in order to prevent a gross miscarriage of justice. The jurisdiction is not to be merely invoked because the trial Court did not appreciate the evidence properly, and hence a different view is possible. In *Direndranath* v. *Mukundalal Sen*[3] it is again stressed that merely becuse a different view of the evidence can be taken, interference in revision would not be justified when there is an application by a private party to set aside an order of acquittal. But this decision appears to be prior to the amendment of section 417, Criminal Procedure Code, pointed out earlier as the decision states the law to be that a private party has no right of appeal against an acquittal as such.

But there is a further difficulty, apart from the undeniable fact that this is an extraordinary power, that our power is further circumscribed by the terms of section 439 (4), Criminal Procedure Code, as we have pointed out. In *Stephens* v. *Nosibolla*[2] the Supreme Court limited its observations to the exceptional nature of

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1. A.I.R. 1954 S.C. 226. A.I.R. 1951 S.C. 196: (1952) S.C.R. 597 (S.C.).
2. (1952) S.C.J. 253 : (1952) 2 M.L.J. 135: 3. A.I.R. 1955 S.C. 584.

the revisional jurisdiction. But in *Logendranath Jha* v. *P. Lal Biswas*[1], their Lordships of the Supreme Court made certain observations exposing another very real difficulty, which might even amount to a dilemma, in the exercise of the jurisdiction. The following passage renders this explicit :—

> "No doubt, the learned Judge formally complied with sub-section (4) by directing only a re-trial of the offence without convicting them, and warned that the Court retrying the accused should not be influenced by any expression of opinion contained in his judgment. But there can be little doubt that he loaded the dice against the appellants, and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in his judgment, as to the credibility of the prosecution witnesses and the circumstances of the case in general ".

The difficulty emerges clearly from these observations. In order to justify interference in revision against an acquittal at all, even it may be by a direction for retrial, the grounds have to be necessarily stated, and stated at some length. The power itself being extraordinary, and not to be invoked merely because a different view of the merits is possible, but because, in effect, there has either been an illegality vitiating the trial, or a gross miscarriage of justice, the exercise of this extraordinary power must be justified by reasoning and discussion of the facts. But, on the contrary, the Court holding the re-trial must be free, in the interests of justice, to try the case without prejudice or pre-judgment and arrive at its independent conclusions, untrammelled by the observations of this Court. This is to steer between Scylla and Charybdis ; and we doubt whether such delicate navigation could always be successful. Hence our conclusion is that, from every point of view, it would be far more satisfactory to be seized of the subject-matter of an erroneous acquittal amounting to a gross miscarriage of justice, in the form of an appeal against that acquittal, and not a revision proceeding. We do not desire to be understood as holding the view that a revision against the acquittal under section 439, Criminal Procedure Code, is inconceivable ; particularly where it is upon a ground of manifest illegality, it may not present certain of the difficulties that we have referred to. But where the accused have been erroneously acquitted in a grave crime under such circumstances that the acquittal itsself is a gross miscarriage of justice, it is clearly far more satisfactory that we shall be seized of this subject-matter in the form of an appeal against the acquittal, which would at once avoid the embarrassment o directing a re-trial without making observation upon the merits which might be prejudicial, and also further enable us to convict the accused, if that course is justified.

Consequently, we are of the view that the following procedure will be in the best interests of the parties and of the State, in all such cases, and we have consequently no hesitation in commending it. As the law stands at present, it is permissible for a party to appeal by Special Leave against the acquittal under section 417, Criminal Procedure Code, though he is a private party and not the State. But if the party prefers, instead, to come by way of revision under section 439, Criminal Procedure Code, it would be available for such a proceeding to be instituted within two months of the date of the acquittal. It will then be possible for us to order immediately notice to the learned Public Prosecutor for the State, even before admitting the revision petition, as we have done in the present case. The learned Public Prosecutor could peruse the records on such notice, and satisfy himself whether it is in the interests of justice to press for interference with the acquittal, or otherwise. If he is of the former conviction, by may then consider the institution of a regular appeal against the acquittal by the State itself, which would enable us to convict and sentence the accused, setting aside the order of acquittal, if we arrive at the conclusion that this is essential in the interests of justice.

We shall make very few observations upon the *prima facie* merits of the present revision proceeding. We propose to be as qualified and guarded in our remarks as possible as, at this stage, we are merely admitting this proceeding in revision, and directing the issue of notice to the accused concerned. We have heard Sri S. Mohan Kumaramangalam, for the revision petitioner, who has taken us through

1. (1951) S.C.J. 503 : (1951) 2 M.L.J. 288.

the facts of the record, and we have also heard the learned Public Prosecutor for the State. It is sufficient to observe, at this stage, that there seems to be much to be said for the view that proof of guilt, at least as far as the shooting of the victim by one of the accused is concerned, does not merely depend upon direct evidence, which may be tainted, in the context of bitter factions. There is considerable circumstantial evidence, both relating to bloodstains recovered at the spot, the recovery of the gun (M.O.1), of certain bullets or pellets which could have been fired from this gun, and of the testimony of the ballistics expert (P.W. 15), with regard to all of which we are not at all satisfied that the total rejection of the evidence is justified. But if this circumstantial evidence has to be taken into account, in corroborating the evidence of direct witnesses, it is sufficient for us to observe, at present, that the case might take on a different complexion altogether.

For these reasons, we admit the revision petition, and direct the issue of notice to the concerned accused. It is for the consideration of the learned Public Prosecutor, in view of his representations about this case, and of the procedural clarification that we have made above, whether he should not institute a petition of appeal against the acquittal by the State, along with a petition to condone the delay, if any bar of limitation has supervened. If such an appeal against the acquittal is instituted and is admitted, it will then be heard along with the present revision proceeding, as the course most likely to subserve the interests of justice. It is needless for us to add that our observations are not intended, in any way whatever, to affect the merits of the acquittal itself, after duly hearing the accused, or even the admission of any appeal against acquittal which may be instituted in this Court.

V.S. ——— *Petition admitted. Notice to the accused ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Srila Sri Pichaia Sivachariar .. *Petitioner**

v.

The Commissioner for Hindu Religious and Charitable Endowments, Madras .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 65—Notice under containing a draft scheme for the Math without provision for consultation—Commissioner's duty to consult trustee—Whether consultation is nullified by the addition of a draft scheme to the notice.

Section 65 of the Madras Act XXII of 1959 does not in terms provide for the content of the notice to be given thereunder, except that it shall be the duty of the Commissioner to consult the trustee before deciding to frame a scheme. There are no valid reasons to hold that consultation is nullified by the addition of a draft scheme to the notice.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the issue of a writ of *certiorari* calling for the records of the case, intended to be taken by the Commissioner, Hindu Relgious and Charitable Endowments, Madras, pursuant to the Notice O.A. No. 2 of 1960 (E4), dated 4th June, 1960, on his file and quash the same.

R. Gopalaswami Iyengar, for the Petitioner.

The Court made the following

ORDER.—The petitioner is the Madathipathi of Mela Madam, Tirunelveli, in respect of which Math the Commissioner for Hindu Religious and Charitable Endowments, Madras, has initiated proceedings under section 65 of Madras Act XXII of 1959. The notice which initiated the proceedings contains a draft scheme which the Commissioner proposes to take into consideration as a scheme suitable for the Math in question.

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* W.P. No. 853 of 1960. 25th August, 1960. (3rd day of Bhadra, 1881—Saka).

The learned counsel for the petitioner contends that proceedings were already initiated even before Act XXII of 1959 came into force and that during the pendency of that proceeding Act XXII of 1959 came into force which necessitated the issuing of the notice under section 65 of the new Act. This notice contains the draft scheme proposed to be framed for the Math in question. According to the learned counsel this indicates the decision of the Commissioner to frame a scheme irrespective of any objections which the Madathipathi might put forward.

I cannot say that the apprehension of the petitioner is entirely unfounded because the form of the notice issued to petitioner seems at first sight to justify the feeling that the Commissioner has already made up his mind to frame a scheme for this Math. On the other hand, section 65 clearly envisages that an opportunity should be given to the Madathipathi to put forward his case on the point of the necessity or desirability for framing a scheme; because that section enjoins the duty on the part of the Commissioner to consult in the prescribed manner the trustee and the persons having interest before making up his mind. However, the contents of the notice, in my opinon, do not warrant the apprehension that the Commissioner would not hear the petitioner's objections. Section 65 does not in terms provide for the content of the notice to be given thereunder except that it shall be the duty of the Commissioner to consult the trustee before deciding to frame a scheme. It is urged that the notice issued to the petitioner does not provide for such consultation. To hold that such consultation is nullified by the addition of a draft scheme to the notice I do not find any valid reasons. I am sure the Commissioner would hear the objections of the Madathipathi on the question of necessity or desirability for framing a scheme before passing any orders in the proceedings now pending before him. In this view the writ petition is dismissed.

K.L.B. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S.A. O. S. Karuppan Chettiar ... *Petitioner**

v.

The State of Madras represented by the Collector of Thanjavur ... *Respondent.*

Madras Estates (Supplementary) Act (XXX of 1956)—*Section* 7 *and Limitation Act (IX of* 1908), *section* 29 (2) *and* 14—*Scope and applicability—Jurisdiction of the Special Appellate Tribunal to excuse delay on the ground of pursuing other remedies* bona fide.

Section 29 (2) of the Limitation Act will have the effect of applying the various sections referred to therein to proceedings under section 7 (1) of the Madras Estates (Supplementary) Act, 1956, which is a special or local law within the meaning of the expression as used in the said section of the Limitation Act. The nature of proceedings under section 7 (1) of the Madras Estates Supplementary) Act, 1956, is not that of an appeal *simpliciter* but in the nature of an application as the jurisdiction of the Special Appellate Tribunal under the Act is wider than that of the original tribunal. Hence the provisions of section 14 of the Limitation Act will be attracted to such proceedings. Where a party was prosecuting *bona fide*, a writ application against the order of the tribunal, the time taken therein could be excluded in computing the limitation under section 7 (1) of the Act.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to excuse the delay in the presentation of S.R. No. 29962 of 1959, S.T.A., sought to be preferred to the High Court against the order of the Estates Abolition Tribunal, Vellore, dated 15th May, 1957 in A.S. No. 216 of 1956.

R. Gopalaswami Ayyangar, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*) on behalf of the Respondent.

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* S.T.P. No. 107 of 1959. 4th April, 1960.
(15th Chaitra, 1882 Saka.)

The Order of the Court was made by

Ramachandra Iyer, J.—This is an application to excuse the delay in the presentation of an appeal against the order of the Estate Abolition Tribunal, Vellore, in A.S. No. 216 of 1956. The appeal is filed under section 7 (1) of the Madras Estates Supplementary Act, 1956 (Act XXX of 1956), which shall hereafter be referred to as the Act. The order of the Estates Abolition Tribunal, which in turn set aside the order of the Settlement Officer IV, Tiruchirapalli, held that Inam Kudimeri was not an inam estate within section 2 (7) of the Abolition Act (XXVI of 1948), and that was passed on 15th May, 1957. Madras Act XXX of 1956 came into force on 3rd August, 1957. Under section 7 of the Act, read with section 11, a right of appeal is provided against the decisions of the Estate Abolition Tribunal to the Special Appellate Tribunal. Prior to the Act, there was no appeal against such orders. The petitioner, evidently oblivious of the right conferred, applied to this Court under Article 226 of the Constitution in W.P. No. 725 of 1955 to call for records in A.S. No. 216 of 1956, on the file of the Estates Abolition Tribunal, Vellore, and to quash the order of the Tribunal therein. The Writ Petition was filed on 9th August, 1959. It came up for hearing on 7th August, 1959. An objection appears to have been taken to the maintainability of the petition on the ground that the petitioner had an effective remedy by way of an appeal. The petitioner, thereupon, took time to consider the position, and, under a mistaken impression that the proper remedy was to file an application to the concerned Tribunal under section 3, filed an application on 11th August, 1959 with the Tribunal. Shortly thereafter, that is, 21st August, 1959, the writ petition was withdrawn and dismissed. The petitioner later realised that an application under section 3 was not the proper way of contesting the order, and that the appropriate remedy was an appeal to the Special Appellate Tribunal, the petitioner filed one on 13th October, 1959. Computing the time from the date of the order of the Estate Abolition Tribunal, there has been a delay of nearly 2 years and 3 months. Under section 7 of the Act, any person aggrieved by a decision of a Tribunal could file an appeal to the Special Appellate Tribunal consisting of two Judges of the High Court, nominated from time to time by the Chief Justice in that behalf, within a period of two months from the date of the decision. The Special Appellate Tribunal may, in its discretion, allow further time not exceeding three months for filing such an appeal. The effect of the various provisions of the Act is that the decision rendered by the Estates Abolition Tribunal on 15th May, 1957, will be deemed to be one given by a Tribunal constituted under the Act, and the party concerned will have a right of appeal under section 7 (1).

Prima facie, however, the appeal is barred by limitation, as it was not presented within two months of the date of the order of the Tribunal; indeed, it could not be filed within that time as the Act had not come into force by then. Nor was it filed within three months thereafter, within which time there is a discretion vested in the Court to excuse the delay in presentation. To get over the difficulty, the learned counsel for the petitioner invokes the aid of the principle embodied in section 14 of the Indian Limitation Act; he contends that the petitioner was prosecuting with due diligence and *bona fide* W.P. No. 725 of 1957 in this Court, from 9th August, 1957 to 21st August, 1959, for obtaining the relief sought in the appeal. If the petitioner is held entitled to the deduction of the time spent in the prosecution of W.P. No. 725 of 1957, being filed within 5 months of the impugned order, the further time taken for the application under section 3 was also claimed to be spent *bona fide*. That question does not arise except for the purpose of exercising this Court's discretion.

Section 7 of the Act limits the time, within which the Special Appellate Tribunal could under its discretion excuse any delay. Section 5 of the Limitation Act does not apply to such appeals.

In *Krishnaswami Gopanna Manradiar* v. *Gopanna Manradiar*[1], an appeal was filed to the Tribunal constituted under the Abolition Act after the amendment of section

1. (1958) 2 M.L.J. 275.

15 (2) (*a*) of Act XXVI of 1948. Prior to the amendment, the Tribunal had an unlimited discretion to grant time for preferring an appeal. But the amendment limited that period to one of six months. It was held that, as on the date when the appeal was presented the powers which the Tribunal had of excusing the delay in the presentation were those contained in the amended section, the Tribunal could not extend the time beyond the period fixed by the amendment.

In *State of Madras* v. *Venkataswami Naidu*[1], an application under section 4 of the Act was filed by the State Government before the Special Appellate Tribunal, 3 days after the time allowed therein. It was held that there was no specific provision in the Madras Act XXX of 1956 which conferred jurisdiction on the Special Appellate Tribunal to condone any delay in filing an application under section 4 of the Act, nor did the Tribunal possess any inherent jurisdiction to excuse the delay in filing an application before it. It was further held that provisions of section 5 of the Limitation Act would not apply to such cases. In neither of the cases referred to above did any question arise as to how the time has to be reckoned, *i.e.*, whether the applicant was entitled to the exclusion of any time, *e.g.*, those covered by sections 4 and 9 to 18 of the Limitation Act. In the first case it was contended that the appellant had a vested right to get the delay excused, as, at the time when the proceedings were instituted, the Tribunal had unlimited discretion to extend time. That contention was negatived. In the second, an application was made to excuse the delay on a ground analogous to that contained in section 5 of the Limitation Act. That too was negatived. But a case for the exclusion of time on a ground specified in section 14 of the Limitation Act is not one to excuse a delay in presentation of the appeal. The question is one of computation of time. If the period, during which the Writ Petition was pending in this Court, were to be excluded, the appeal would be within the time.

Section 29 (2) of the Limitation Act states:

> "Where any special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law.
>
> (*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and
>
> (*b*) the remaining provisions of this Act shall not apply. . . . . . "

(*The rest of the section omitted.*)

It cannot be denied that Madras Act XXX of 1956 will be a special or local law within the meaning of the above provision. The Act does not expressly exclude the application of sections 4, 9 to 18 and 22 of the Limitation Act. It would, therefore, follow that the provisions of section 14 will be applicable to the proceedings envisaged in Act XXX of 1956. The learned Additional Government Pleader did not contest that section 29 (2) of the Limitation Act would have the effect of applying the provisions of the various sections referred to therein to proceedings under section 7 (1) of the Act; but he contended that the provisions of section 14 of the Limitation Act would not apply by reason of that very terms to an appeal. That section allows exclusion of time only in cases of suits and applications. It stands also to reason that section 14 should not be extended to appeals. Where a statute gives a right of appeal against the decision of a tribunal, the appeal should be filed within the time allowed for it. A party cannot at his whim or caprice resort to other proceedings and failing there, come back and obtain an exemption from the operation of the limitation for the appeal; to permit it would be to enable a party to extend the period of limitation and in some cases to adopt dilatory tactics. Indeed it may even be said in such a case, the appellant was not acting *bona fide*, which is an essential condition for the application of section 14.

It was, however, contended for the petitioner that as section 29 (2) does not make the provisions of section 2 of the Limitation Act applicable, the definition of

1. (1959) 2 M.L.J. 391.

the word " suit " will be abrogated, and that the ordinary rule that the word "suit" includes an " appeal " would prevail, with the result that in all cases of special or local laws coming within the former provision, section 14 (1) would apply to appeals as well. There is an obvious fallacy in the contention. Section 29 (2) refers to suits, appeals and applications. Section 14 specifically refers to suits and applications and omits any reference to appeals. If the word " suit " were intended to include an appeal, there is no necessity for section 29 to refer to it. It is a familiar rule of construction that tautology should not be attributed to the legislature. It should, therefore, follow that suits and appeals and applications are kept distinct in the Limitation Act, as indeed the arrangement of the schedules would show. When section 14 provides for suits and applications alone, it must be held that the legislature for good reasons did not want to give the benefit of the exclusion of time provided for in section 14, to appeals.

But the question still remains as to what precisely is the nature of the proceedings under section 7 (1) of the Act. It is certainly not a suit, for a suit is one whch originates in a plaint. Is it not an appeal or merely an application ? It is not uncommon that under certain special statutes, an appeal is dealt with as an application, *e.g.*, Trade Marks Act, Trade Unions Act, etc. On the Original Side of this Court, appeals from the Master's orders are registered only as applications.

An appeal, as defined in Wharton's Law Lexicon,

" is the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of inferior Court."

Subrahmanya Iyer, J., after referring to the above definition, observed in *Chappan* v. *Mohideen Kutti*[1].

" In consonance with this meaning of the word, appellate jurisdiction means, ' the power of a superior Court to review the decision of the inferior Court.' Here two things which are required to constitute appellate jurisdiction are the existence of superior and inferior Courts and the power on the part of the former to review the decisions of the latter. This has been well put by Story: ' The essential criterion of the appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other Court whose judgment or proceedings are to be revised.' (Section 1761 of the Commentaries on the Constitution of the United States.)".

The test laid down by Subrahmanya Iyer, J., will apply, not only to Courts but to a hierarchy of Tribunals established by a statute providing for an appeal from the decision of one to the other.

An appeal under section 7 (1) of the Act, if laid against a decision of a Tribunal constituted under section 5 thereof, will satisfy the two tests referred to above. Such an appeal will not be an application ; the provisions of section 14 of the Limitation Act cannot apply to it.

But the position would be different in regard to cases decided by the Tribunal under the Abolition Act. Before the Act, no appeal lay from the decisions rendered under section 9 of the Abolition Act to the Special Appellate Tribunal. After the passing of the Act, a right to challenge the decision is given both to the Government and the private party. Section 4 provides that the State Government can file an application against the decision of the Tribunal constituted under the Abolition Act for a declaration that any non-ryotwari area is an estate or an inam estate and that such an application would be to the Special Appellate Tribunal under section 7 and dealt with as an appeal. Section 11 (2) provides for cases where the Tribunal under the Abolition Act has given a finding at the commencement of the Act that a particular area is an inam estate. Such a finding is deemed to be decision given by the Tribunal constituted under the Act and the provisions of section 7 (1) is made applicable. Section 11 (2) (*b*) is the counterpart of section 4 (2) (*b*). Both deal with the adjudications given by the Tribunal under the Abolition Act. The practice of this Court is to register both types of cases as appeals. The two tests laid down

1. (1898) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 at 80 (F.B.).

in *Chapan* v. *Mohideen Kutti*[1], are not satisfied in that under the Abolition Act the decisions under section 9 were not subject to any appeal to the Special Appellate Tribunal. Act XXX of 1956 gives a power to the Special Appellate Tribunal to entertain appeals against such order as if it were a decision by the Tribunal under the Act. Section 4 states that the State Government wishing to challenge the decision should file an application. A case under section 11 (2) (*b*) would be similar. When, therefore, an order of the Tribunal under the Abolition Act is sought to be challenged by way of appeal before the Special Appellate Tribunal, what is filed can be termed an application to set aside an order from which an appeal did not lie when the order was passed ; but by virtue of sections 4 and 11, a jurisdiction is conferred on the Special Appellate Tribunal to hear an appeal from it.

It will be noticed that the power given to the Special Appellate Tribunal is wider than that of the Tribunal under the Abolition Act. The latter authority could only decide whether a disputed village was " an inam estate" coming under the Abolition Act. Though for the purpose of that decision it would have to decide the question whether at all the village was an estate within section 3 (2) (*d*) of the Estates Land Act, that decision would not be final. The Special Appellate Tribunal sitting in appeal in cases covered by sections 4 and 11 will have the jurisdiction to decide even that question finally. Ordinarily an Appellate Tribunal's powers are co-extensive with that of the original tribunal. What sections 4 and 11 have given is something more than a mere appellate power, *i.e.*, partly an original jurisdiction. An " appeal " under section 7 read with section 11 would, therefore, partake the character of an application ; the provisions of section 14 (2) of the Limitation Act would therefore apply to it.

The learned Additional Government Pleader then contended that the provisions of section 14 of the Limitation Act will not apply, as it could not be held that this Court was unable to grant the relief in the Writ Petition by reason of any defect of jurisdiction, this Court could in its discretion have quashed the order of the tribunal under Article 226 of the Constitution notwithstanding the fact that an alternative remedy by way of appeal existed. When, therefore, this Court declined to interfere, it was by virtue of the discretionary nature of the jurisdction under Article 226. Reliance is placed upon the decision in *Baiznath Lola* v. *Ramadoss*[2], where it was held that time spent to prosecute a revision petition against the order under section 73, Civil Procedure Code, should not be deducted under section 14 of the Limitation Act in a subsequent suit that might be brought to set aside the order. It is unnecessary to consider whether, in view of the subsequent decision of a Full Bench of this Court, which defined the nature of the revisional jurisdiction, this decision could be held to be correct. We are of opinion that the present case would be one, coming under the clause " or other cause of a like nature, is unable to entertain it."

It was next contended that the proceedings under Article 226 could not be said to be civil proceedings within the meaning of section 14. There is no substance int his contention either. In *Dhanalakshmi Ammal* v. *Income-tax Officer, Madras*[3], it was held that, notwithstanding the fact that in proceedings under Article 226 of the Constitution, the High Court did not declare the civil rights of parties or decide disputed questions of title, in proper cases the Courts could enforce such rights in cases of infringements by the issue of prerogative writs, and that the issue of such writs in a matter involving civil rights of parties, would be an order in a civil proceeding. It cannot be doubted the rights involved in W.P. No. 725 of 1957 are civil rights ; it would, therefore, be a civil proceeding. These proceedings have been prosecuted *bona fide* and the petitioner will be entitled to the exclusion of the time taken therein. The appeal will be treated as filed in time, and registered accordingly.

R.M. *Petition allowed.*

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1. (1898) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 (F.B.).
2. (1915) 27 M.L.J. 640: I.L.R. 39 Mad. 62
3. (1957) 2 M.L.J. 567.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

V. Ramaswamy Iyengar and K. R. Subramania Iyer, Receivers, Estate of late Rm. Ar. Rm. Arunachalam Chettiar and legal heirs, Devakottai .. *Applicants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922), sections 10, 33, 41 and Rule 28 under section 5-A (8)—Appeal by Assessee-Receivers against assessment made under section 41 to the Tribunal—No appeal by the Department —Tribunal has no power to change the mode of assessment to one under section 10—Scope of the Appellate power and remand—Section 66 (6)—Return of the institution fee—Direction by the High Court to the Tribunal.

The order of the Appellate Tribunal finally upheld the assessment for 1939-1940 under section 41 of the Act (there was no controversy about it) and declared that the assessment should be made in three shares. What was left to be determined was the actual division of the total income between the three units. That order having become final under section 33 (*b*) it would be no longer open either to the department now to contend that the basis of assessment should change or for the Receivers to say that the assessment should be distributed into more than three shares. The Tribunal would have no jurisdiction to direct re-assessment of the income under section 10 directly on the Receivers for the year (1939-1940).

It is a fundamental principle that no litigant has an inherent right of appeal against a judicial order unless such right is given by a statute. It is also settled that where the whole or part of an order has not been appealed against, it would be final ; and the appellate authority, in case there is an appeal against a part of an order, would have no jurisdiction in the absence of statutory provision, to interfere with the other part which does not form the subject of the appeal. Where a statute confers a right to appeal to an appellate authority, its powers and functions are limited by the terms of that statute.

Section 33 declares that there would be a right of appeal against an order of the Appellate Assistant Commissioner both to the assessee and the department. The jurisdiction of the Appellate Tribunal should in the absence of express words in the statute be governed by the subject matter of the appeal. Section 33 (4) unlike section 33 (3) does not vest any power in the Appellate Tribunal to enhance the tax except when there is an appeal by the Department. It would follow that the Tribunal would have no jurisdiction to pass an order so as to permit a ground to be raised by the respondent department which if allowed would make the position of the appellant worse than what it was before. It would have no power to expand the appeal so as to benefit the respondent.

A power to remand is not expressly given by section 33 (4). But such power is implicit in the words 'pass such orders thereon'. Rule 28 confers the power of remand upon the Tribunal. On a reading of section 33 (1) together with rules 9, 12 and 27 it would be clear that the power of remand conferred on the Tribunal by rule 28 is only incidental to its power to hear and dispose of the appeal. If in an appeal the Tribunal could interfere in favour of the appellant, a remand could be made as incidental to that power, that is, for the purpose of giving relief to the appellant. But a power of remand could not be exercised so as to exceed the jurisdiction of the Tribunal under Section 33 (1). The Tribunal would have no jurisdiction to enhance assessment except when there is an appeal by the department itself. It would follow that it could not exercise the power of remand for the purpose of enhancing the tax.

The Tribunal would have no jurisdiction to direct the assessment to be made on the Receivers under section 10 of the Act as an association of persons and that it can only dispose of the appeal on the footing that there has been a proper assessment of the Receivers under section 41 of the Act.

Case law discussed.

The payment of one hundred rupees was incidental to the reference which commenced with the application preferred by the assessee under section 66 (1) of the Act and terminated with its disposal by the Court under section 66 (5). The Proviso to section 66 (1) enables the Tribunal to order refund in certain cases when the proceedings terminate before the Tribunal and do not come before the High Court. When the reference does come up before the High Court and is finally disposed of there, section 66 (6) enables the High Court to deal with all the costs of the reference including what had been deposited with the Tribunal as the institution fee. A direction to the Tribunal to refund the amount would issue.

Chidambaram Chettiar v. *Commissioner of Income-tax*, (1945) 13 I.T.R. 177 and *Raghavalu Naidu & Sons* v. *Commissioner of Income-tax*, (1945) 13 I.T.R. 194, followed.

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*Case Referred No. 26 of 1957. 3rd May, 1960.
(13th day of Vaisakha, 1882 Saka.)

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. Nos. 278 to 293 of 1954-55 (I.T.A. Nos. 4736, 4721 to 4735 of 1952-53 Assessment years 1939-40, 1941-42 to 1946-47) on its file for decision on the following question of law, *viz.*,

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in directing the assessment to be made on the Receivers under section 10 of the Indian Income-tax Act as an association of persons?"

R. Kesava Ayyangar and *K. Parasaran*, for Applicants.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, on behalf of the Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This reference under section 66 (2) of the Indian Income-tax Act relates to the assessment years, 1939-40 and 1941-42 to 1946-47, the relative year of account ending on the 12th of April, of each year of assessment. One Arunachalam Chettiar (senior) and his son, Arunachalam (junior), constituted members of a Hindu undivided family. They were resident in India. The family had considerable properties in India and outside, comprising tea and rubber estates, cocoanut gardens and several money lending businesses. Arunachalam Chettiar (junior) died in 1934, leaving behind him his widow, Umayal Achi. Arunachalam Chettiar (senior) who survived his son, died on 22nd February, 1938. On his death, the claimants to the properties were his two widows, Lakshmi Achi and Nachiar Achi, and his widowed daughter-in-law, Umayal Achi. Some time prior to his death, that is, on 8th January, 1938, Arunachalam Chettiar (senior) executed a will, making certain dispositions. Under the will, the executors were directed to arrange for the adoption of a son to each of the three ladies (such multiple adoption being presumably sanctioned by the custom of the Nattukottai Chettiar community). The will directed that, after the payment of legacies, the three adopted sons were to divide the properties equally. Umayal Achi, however, did not accept the will. She filed a suit in the Sub-Court, Devakottai, claiming a half share in the estate, left by her deceased father-in-law. The claim was laid on the basis of the rights conferred by the Hindu Women's Rights to Property Act, 1937, under which the widow of the pre-deceased son of an individual who died after the coming into force of the Act was entitled to certain rights. Pending the suit, that is, on 18th August, 1938, two Advocates, Ramaswami Iyengar and Subramania Iyer, were appointed Joint Receivers to manage the properties involved in the suit. As a part of their management, the Receivers continued the various businesses, which Arunachalam (senior) had carried on in his lifetime.

The suit was resisted by the two widows of Arunachalam (senior), who denied the right of Umayal Achi to inheritance. The Trial Court found that the will executed by the deceased was a genuine one, but that Umayal Achi would be entitled to one half share in all the properties in India and in the moveable properties situate outside India, subject to the payment of the legacies mentioned in the will. As regards the immoveable properties situate outside India, the Court held that succession to the properties would be governed by the law of the place where the properties were situate. In accordance with the judgment, a preliminary decree was passed on 26th October, 1940. There were appeals against the decree to this Court; this Court modified the decree of the lower Court, restricting it to the non-agricultural and moveable properties situate in India. The judgment of the High Court is reported in *Umayal Achi* v. *Lakshmi Achi*[1], Umayal Achi filed an appeal against the decree of the High Court to the Federal Court. The Federal Court, by its judgment, dated 8th January, 1945, held that Umayal Achi would be entitled to one half share in the separate, non-agricultural properties left by the deceased and in the moveables. The Court directed that there should be an ascertainment by the Subordinate Judge as to what were the separate properties that belonged to the deceased, in which the lady would have a right to a share. (The Judgment of the Federal Court is reported in *Umayal Achi* v. *Lakshmi Achi*[2].)

1. (1944) 1 M.L.J. 70. 2. (1945) 1 M.L.J. 108 (F.C.).

In June, 1945, each of the three ladies adopted a son, as directed by the will. It is stated that there was an ante-adoption agreement in each case, defining the rights *inter se* between the son to be adopted and the respective adoptive mother. Aggrieved by the judgment of the Federal Court, Umayal Achi filed an appeal to the Privy Council, after obtaining leave for the same.

While the appeal was pending in the Privy Council, the ladies, on behalf of themselves and their respective adopted son, entered into a compromise, under which each of the widows, representing herself and her adopted son, agreed to take 1/3rd share of the entire estate left by the deceased. The compromise was, dated 17th December, 1947. It is claimed that the ladies subsequently divided what they obtained under the compromise with their adopted sons, in accordance with the ante-adoption agreement. In October, 1954, the Receivers were discharged.

In the meanwhile proceedings for the assessment of income from the businesses and properties left by the deceased were initiated against the Receivers. For the Assessment year 1939-40, the Officers of the Income-tax Department assessed the Receivers under section 41 of the Indian Income-tax Act. They held that the shares of the widows being in dispute should be held to be indeterminate, and therefore levied the maximum tax on the total income under the First Proviso to section 41. That assessment was duly taken on appeal to the Appellate Tribunal. By its order, dated 28th January, 1942, the Appellate Tribunal held that the three widows were the legal heirs of the deceased, that their shares could not be said to be indeterminate, though it might be that they had not yet been determined by the Court; and that, therefore, the levy of tax at the maximum rate was not justified. There was, however, some defect in the order of the Appellate Tribunal, as, in the final paragraph, it did not give effect to the finding referred to above. This was rectified, on an application under section 35, on 11th February, 1946. The order on the rectification petition made it clear that the assessment was to be made on the shares of each of the widows. By the earlier order referred to above, the Tribunal directed the Income-tax Officer to compute the income, in accordance with the finding given. The Income-tax Officer held that, on the material dates, the beneficiaries of the estate were only the two widows of Arunachalam Chettiar (senior), the rights of Umayal Achi having come into existence under the compromise long thereafter. The Officer, therefore, allocated the income equally in two shares between the widows, and assessed the Receivers to tax thereon. On this point, the Appellate Assistant Commissioner concurred with the Income-tax Officer. This was not accepted by the Receivers, who filed an appeal to the Appellate Tribunal. That appeal was heard along with the appeals for subsequent years, to which we shall make reference presently.

For the years subsequent namely, 1941-42 to 1945-46, during which period neither the adoptions nor the compromise had come into existence, the Income-tax Officer likewise held that the income should be divided into two shares for the purpose of assessment. Individual assessments of Lakshmi Achi and Nachiar Achi were made directly. As stated already, the adoption was made by the widows on 16th June, 1945, that is, during the year of account relative to the assessment year 1946-47.

The Income-tax Officer assessed the income received by the Receivers from 13th April, 1945, to 16th June, 1945, on two individuals, namely, Lakshmi Achi and Nachiar Achi, and the income for the subsequent period namely, from 17th June, 1945, to 12th April, 1946, on the three persons, namely, Lakshmi Achi, Nachiar Achi and Umayal Achi. The assessee contested the propriety of the assessment, on the ground, that it should have been made on 6 units, namely, the widows and their respective adopted sons. The basis of the contention was (1) that Umayal Achi's rights should be held to date back to the date when the succession opened, and (2) that the rights of the respective adopted sons should date back to the dates of death of their adoptive fathers. The Appellate Assistant Commissioner rejected the contention of the asessee, and confirmed the assessment, as made by the

Income-tax Officer. Appeals were, thereupon, filed by the Receivers to the Appellate Tribunal. The only matter, which formed the subject-matter of the appeals, was as to the number of shares in which the assessment on the Receivers should be divided. There was no objection on the part of either the assessee or the Department to the assessment itself being made under section 41. There was no appeal on behalf of the Department either that the assessment under section 41 was wrong, and that the proper way of assessing the profits from the businesses carried on by the Receivers was to assess them directly under section 10.

The Appellate Tribunal, which heard the appeals for the assessment years 1941-42 to 1946-47, along with the appeal for the asessment year 1939-40, called for a report from the Income-tax Officer as to whether the businesses which the deceased carried on were continued by the Receivers during the relevant years. The Income-tax Officer reported in the affirmative, namely, that the businesses of the deceased were carried on by the Receivers jointly. On that finding, which the Appellate Tribunal accepted, it came to the conclusion that the proper way of making the assessment was to assess the Receivers directly under section 10 as an association of persons. In that view, the Tribunal cancelled the assessments made under section 41, and directed the Income-tax Officer to make fresh assessment under section 10 on the Receivers as an association of persons in respect of the businesses carried on by them.

The following question was, thereupon, referred to this Court for opinion :

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in directing the assessment to be made on the Receivers under section 10 of the Indian Income-tax Act as an association of persons ?"

Before proceeding to answer the question referred, it is necessary to ascertain the scope of section 41, under which the Department had chosen to assess the Receivers for all the years. Section 41, omitting the words which are not necessary for the present purpose, runs thus :

"In the case of income, profits or gains chargeable under this Act which . . any receiver . . appointed by or under any order of a Court . . . . . are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such receiver. . . . in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly.:

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons :

[*Second Proviso omitted.*]

(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains."

The section creates a vicarious liability. Where an estate is vested in or managed by another person (whom we shall hereafter refer as the representative), that person could be assessed to tax, in respect of the income of the estate. The section is an enabling one, conferring a power on the Department to assess the representative of a party in such cases. This is made clear by sub-section (2) which states that provisions of section 41 will not prevent the alternative course of assessing directly the person, on whose behalf the income is received. Thus, so far as the beneficial owner of the estate is concerned, there can, at the option of the Department, be a direct assessment of income under the appropriate heads of the legal owner or the representative can be assessed, the beneficial owner being indirectly assessed through such person. In either case the assessment is in substance against the beneficial owner. It would, therefore, follow that, where the Department proceeds to take advantage of the provisions of section 41, and assesses the representative, the measure of the representative's liability would be the same, as if the beneficiaries concerned had received the amount. A case, where the beneficiary is a single person, would present no difficulty, for the assessment of the representative would be the same as that of

the beneficiary. But, where there are several beneficiaries, the assessment will depend upon the fact, whether the interest of the beneficiaries is distinct or at least determinable. In that case, the measure of liability of the representative would be that of each one of the beneficiaries. The assessment will have to be made in as many units as there are shares in proportion to the extent of shares held by each beneficiary. As the beneficiaries would, if separately assessed have to pay tax only at the rate relative to their share of income (if the share of the income is less than the taxable limit, there would be an exemption from tax), the representative, proceeded against under section 41, will have the same liability if, however, the shares of the beneficiaries are indeterminate, the entire income received by the representative would be taxed at the maximum rate, as prescribed by the First Proviso to section 41 (1). As recourse to section 41 is only optional with the Department, the Department could directly assess the beneficiaries But, where the income received by the representative is from a business concern, a direct assessment could not be made, unless the business is carried on by the beneficiaries by their own volition, as, otherwise, they could not be said to constitute a firm or an association of persons.

In *Saifudin Alimohamed* v. *Commissioner of Income-tax*[1], a Mohammadan carrying on business died, leaving behind him two minor daughters. The Court appointed two guardians for the minors, and the former were authorised to continue to carry on the business. It was held that it was open to the Department to assess the income of the guardians under section 10, on the basis that the business was carried on by the guardians in their own right, pursuant to the order of the Court; but that, if the Department elected to proceed against the guardians in their representative character under section 40, they could not be assessed as an association of persons, but that the share of each minor should be assessed separately through her guardian. The same principle would apply to a case under section 41. Thus, where a Receiver or Receivers carried on business on behalf of certain beneficiaries or persons entitled to it under the directions from Court, the parties who have beneficial interest in the business would not constitute an association of persons, because the essential element of a volition to carry on the business jointly would be absent; *a fortiori* in a case where there are minors. In all such cases, the Department, in order to assess the profits as a whole, could assess the Receivers as carrying on business in their own right under orders of Court. But, where the assessment is not made on that footing, but the provisions of section 41 are applied, and the Receivers are assessed not as principals concerned in the business, but as a representative of the beneficiaries, tax could be assessed and levied on the Recivers only on the footing that each of the beneficial owners was assessed separately (*i.e.* in a case where shares are determinate) in regard to his or her share. In the present case, the Income-tax Department elected to assess the beneficiaries indirectly through their representatives, the Receivers.

The question, then, is whether it would be open to the Appellate Tribunal to change the mode of assessment so as to make it a direct one of the Receivers as principal parties to the assessment. In regard to that matter, different principles would apply to the assessment year 1939-40 and the years 1941-42 to 1946-47.

Taking the Assessment year 1939-40, the assessment was made on a Hindu undivided family, but the tax was computed on the footing that the income belonged to the two widows, Lakshmi Achi and Nachiar Achi, half and half at the rates applicable to their respective income. The proper mode of assessment for that year was ultimately decided by the Appellate Tribunal on 28th January, 1942. The order of the Tribunal, read in the light of its rectification contained in the order, dated 11th February, 1946, finally upheld the assessment under section 41—indeed there was no controversy about it—and declared that the assessment should be made in 3 shares, namely, Lakshmi Achi, Nachiar Achi and Umayal Achi. What was left to be determined was the actual division of the total income between the three units. That order having become final under section 33 (6), it would be no longer open either

1. (1953) 25 I.T.R. 257.

to the Department now to contend that the basis of assessment should change or for the Receivers to say that the assessment should be distributed into more than three shares. We, therefore, consider that the Tribunal had no jurisdiction to direct re-assessment of the income under section 10 directly on the Receivers for the year 1939-40.

As regards the assessment years 1941-42 to 1946-47, the Officers of the Income-tax Department had the undoubted option to assess the beneficiaries directly or the Receivers under section 41. They had also the further option to assess the Receivers directly under section 10 in regard to the businesses. In the former case, they could assess the entire income from the estate, namely, its income under all heads, including the income earned in the businesses conducted by the Receivers. In the latter case, the Receivers could be assessed only on the income earned from the businesses, and that could not include the income from the other heads, for then it would be a hybrid assessment partly direct and partly indirect. The order of the Tribunal does not, however, advert to this aspect of the matter. Recourse to section 10, at the present stage, would mean a splitting up of the assessment, the assessment under section 41 being retained in regard to other heads of income, while in regard to the business income it would be on a wholly different assessee, namely, the Receivers in their personal capacity. Whether such a course is permissible, is doubtful. Even if it is permissible, whether it could be allowed in the circumstances of the case, has to be considered. The Department had made its choice as to the mode of assessment; even if that was found to be ultimately detrimental to the revenue, they could have filed an appeal against the order of the Appellate Assistant Commissioner by seeking to assess the Receivers under section 10. This however, was not done. It must, therefore, be taken that the Department was satisfied with the assessment being made under section 41. Would it be open to the Tribunal under those circumstances to take up the matter *suo moto*?

Mr. Rama Rao Sahib, the learned counsel for the Department, urged that, as the Appellate Tribunal had all the powers of Officers of the Department, it was open to them to change the mode of assessment. The learned counsel contended that, as the question, whether the Receivers were to be assessed as persons carrying on the businesses or whether they were to be assessed vicariously by resorting to the provisions of section 41, was a fundamental thing to be decided in respect of the assessment, the Appellate Tribunal was well within its rights to direct the assessment to be done in such manner. The learned counsel, however, conceded that it would not be open to the Tribunal, in the absence of an appeal by the Department, to change the mode of assessment, so as to enhance the tax liability. But he contended that a mere order of remand giving directions to change the mode of assessment would not amount to enhancement of tax liability, though, as a result thereof, the final order of the assessing authority enhanced the tax liability.

A remand by the Appellate Tribunal might, some times, be intended to the benefit of the assessee, though ultimately the actual assessment might be higher than before. In such cases, the higher assessment might be said to be the incidental result of an order of remand which was *prima facie* intended for the benefit of the appellant-assessee. An instance of that kind is the case reported in *Sri Gajalakshmi Ginning Factory* v. *Commissioner of Income-tax*[1]. But there might be cases where the remand will directly lead to an enhanced tax. The present case affords an example of such cases.

The remand which was directed by the Appellate Tribunal was intended to assess the Receivers under section 10. There could be no doubt that such an assessment would enhance the tax liability. Taking, for example, the assessment for the year 1941-42, the Income-tax Officer assessed the income in two shares, namely, that of Lakshmi Achi and Nachiar Achi, and the tax liability was calculated on that basis. The assessee's case was that more persons were entitled to the property in determinate shares, and that, therefore, the assessment should be apportioned

1. (1953) 1 M.L.J. 33 : I.L.R. (1953) Mad. 467 : 22 I.T.R. 502.

according to the shares. If the income from the business is to be assessed under section 10 on the Receivers, the shares would be amalgamated and assessed as the profits of the Receivers at a higher rate and presumably attracting a higher amount by way of super-tax as well.

The question that arises, is, whether in the absence of an appeal by the Department the Tribunal would have power to make the position of an appellant worse than what it was before he filed the appeal. In other words the question is whether the Tribunal can dispose of an appeal by directing an assessment in such a manner that it would inevitably result in the enhancement of the tax liability. It is necessary, in this connection, to refer briefly to the provisions of the Indian Income-tax Act.

It is a fundamental principle that no litigant has an inherent right of appeal against a judicial order, unless such right is given by a statute. It is an equally settled principle that, where the whole or part of an order has not been appealed against, it would be final; and the appellate authority, in case there is an appeal against a part of an order, would have no jurisdiction in the absence of statutory provision to interfere with the other part which does not form the subject of the appeal. Where a statute confers a right to appeal to an appellate authority, its powers and functions are limited by the terms of that statute.

Section 30 gives a right of appeal only to the assessee against an order of assessment by an Income-tax Officer; the Department has no right to appeal against the order of the Income-tax Officer, even if it were prejudical to the revenue. That presumably is for the reason that the Appellate Assistant Commissioner being an officer of the Department would be vigilant in protecting the interests of the revenue, provided a power is given to him to enhance the tax in an appeal by the assessee. Section 33-B enables the Commissioner to *suo moto* revise an order of assessment which is prejudicial to the revenue. Section 31 (3) which enumerates the powers of the Appellate Assistant Commissioner, says :—

"In disposing of an appeal the Appellate Assistant Comissioner may, in the case of an order of assessment, (*a*) confirm, reduce, enhance or annul the assessment or (*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment."

(*The rest of the section is omitted as unnecessary*).

Thus, the power of the Appellate Assistant Commissioner is not confined to the subject-matter of appeal by the assessee. It is much wider. He might examine all matters and dispose of the appeal, even to the prejudice of the assessee by himself enhancing the tax or remanding the case to the Income-tax Officer, with a view to increase the tax liability. But, when the matter comes before a judicial Tribunal, by way of appeal, the same principle cannot apply. The jurisdiction of the Appellate Tribunal should, in the absence of express words in the statute, be governed by the subject-matter of the appeal. Section 33 declares that there would be a right of appeal against an order of the Appellate Assistant Commissioner both to the assessee as well as to the Department. Section 33 (4), which relates to the powers of the Tribunal, runs :—

"The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Section 33 (4) unlike section 31 (3), does not vest any power in the Appellate Tribunal to enhance the tax except when there is an appeal by the Department. Where the decision of the Appellate Assistant Commissioner is detrimental to the revenue, the Department could itself appeal to the Tribunal under section 33 (3). In the absence of such appeal, the Appellate Tribunal could only deal with the actual subject-matter before it, namely, the appeal of the assessee.

Rules have been framed under provisions of section 5-A (8) regulating the procedure to be followed by the Tribunal. Rule 12 states that an appellant shall not except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but that the Tribunal should not be confined to the grounds set forth in the memorandum of appeal in disposing of the matter. This power of the Tribunal to rest its order on a ground, not taken in the memorandum of appeal, is subject to the limitation that it should, before doing so, give sufficient opportunity to the party that may be affected for being heard on that ground. Rule 27 states :—

> "The respondent, though he may not have appealed, may support the order of the Appellate Assistant Commissioner on any of the grounds decided against him."

Rule 28, which confers powers of remand, runs :—

> "Where the Tribunal is of opinion that the case should be remanded, it may remand it to the Appellate Assistant Commissioner or the Income-tax Officer, with such directions as the Tribunal may think fit."

The aforesaid rules, including the power to remand, would be governed by the provisions of section 33 (4), and, therefore, the jurisdiction of the Tribunal would be circumscribed by the subject-matter of the appeal—the subject-matter of the appeal being that contained in the original grounds of appeal, together with such other grounds as may be raised by the assessee by leave of the Tribunal. As the right of the respondent is only to support the order of the Appellate Assistant Commissioner on other grounds, it would follow that the Tribunal would have no jurisdiction to pass an order, so as to permit a ground to be raised by the respondent which if allowed, would make the position of the appellant worse than what it was before. It would however be open to the Appellate Tribunal to permit a ground of appeal by an appellant, so as to enable him to obtain the same or lesser relief; but it would have no power to expand the appeal, so as to benefit the respondent. The distinction is pointed out in *New India Life Assurance Co.* v. *Commissioner of Income-tax*[1]. In that case, the assessee, a life insurance Company, carried on business partly in what was then in the British India, and partly in the Indian States. The Appellate Assistant Commissioner, in an appeal from the order of the Income-tax Officer, held that the income from the policies in the Indian States could not be taxed in British India. There was an appeal by the Department to the Tribunal on the ground that the income from the policies effected in the States should be taken as having accrued in India. But when the case was heard by the Tribunal the Department urged, as an alternative ground, that, although the policies were effected outside the British India, a portion of the process for earning the income had taken place in the British India, and, therefore, there should be allocation of the profits, and that portion thereof referable to the work done in India should be rendered liable to tax. The Tribunal accepted the alternative case, and remanded the case, directing the Appellate Assistant Commissioner to consider the question of apportionment. It was held that the Appellate Tribunal had power to give leave to the appellant to raise the question of apportionment, and that it was within its competence to reverse the decision of the Appellate Assistant Commissioner, on the ground that the liability to tax should be determined, after deciding the question whether the income earned could be apportioned. It will be noticed that, in that case, the Appellate Tribunal was concerned only with the question whether the relief could be given to an appellant on a ground not taken by him. The interference was well within the subject-matter of appeal, the relief granted being less than what the grounds of appeal justified. Dealing with section 33 (4) the learned Judges observed at page 856 :—

> "The expression "thereon" has come in for considerable judicial comment and observation, and the authorities lay down that the power of the Tribunal is confined to dealing with the subject-matter of the appeal and the subject-matter of the appeal is constituted by the grounds of appeal preferred by the appellant. This subject-matter cannot be expanded even by the appellant unless leave is granted to him to do so by the Appellate Tribunal. The subject-matter *can certainly not be expanded by the respondent, as already pointed out, if he has not either appealed or cross-objected.*"

1. (1957) 31 I.T.R. 844.

Recently, we had occasion to consider a similar question in B.C. No. 75 of 1957. In that case, an assessee was having a dual capacity (1) as the sole surviving member of a Hindu undivided family, and (2) as an individual. He was assessed as an individual in respect of certain foreign profits received in India. The assessee objected to the assessment on the ground that the profits being received by the Hindu undivided family, they could not be included in the individual assessment. He also contested the position that the remittances were received during the year of account. The Appellate Assistant Commissioner upheld the legality of the inclusion in the assessment of the individual the income of the family. He, however, held that the remittances of foreign profits were not received during the year of account. The Department filed an appeal to the Tribunal. The only point taken by the Department related to the question of remittance of the foreign profits. There was no objection on the part of the Department that the assessment should be made separately on the assessee in regard to the two distinct capacities he possessed, namely, that of an individual and that of the sole surviving member of the Hindu undivided family. The Tribunal did not decide the question raised in the appeal, namely, whether the monies were received in the year of account. It held that the Income-tax Officer committed a fundamental mistake in clubbing the assessment of the individual with the Hindu undivided family, and remitted the case to enable the Income-tax Officer to make a fresh assessment on the family and the individual separately. We held that the Tribunal would have no power to travel outside the subject-matter in the controversy in the appeal and decide the appeal in favour of the appellant on a ground which was not the subject-matter of dispute before it.

In *Motor Union Insurance Co., Ltd.* v. *Commissioner of Income-tax*[1], it was held that it was not open to the Tribunal itself to raise a ground or permit the party, who had not raised a ground, which would work adversely to the appellant. Referring to rule 21, the learned Judges held that, while it recognised the principle that the judgment of the lower Court could be supported on any ground, not raised in the memorandum of appeal, it could not permit the Tribunal to suggest another mode of assessment altogether. The question again came up for consideration in *Puranmal Radhakishan* v. *Commissioner of Income-tax*[2]. It was held that the Appellate Tribunal could only decide on the basis of the grounds of appeal raised or permitted to be raised, but that it was not open to the Tribunal itself to raise a ground or permit a party who has not appealed to raise a ground which would work adversely to the appellant. In that case, the question related to the extent to which loss could be allowed in favour of the assessee who was a dealer in shares. In the previous year, the assessee had purchased the shares at Rs. 1,100 per share. In the following year, he sold them at Rs. 225 per share. The controversy between the Department and the assessee was whether the loss allowed to the assessee should be calculated on the difference between the cost price Rs. 1,100 and the sale price Rs. 225, or on the difference between the market value of the shares on the date of the purchase, that is, Rs. 715, and the price Rs. 225 for which it was sold. The Officers of the Department held in favour of the latter contention. In an appeal by the assessee, the Tribunal gave a finding that the proper method of calculating the loss was to ascertain the market value of the shares on the date on which the assessee treated them as his stock-in-trade and the sum for which it was sold. It was held that the market value of the shares on the date on which it was brought in to the account of the assessee as part of stock-in-trade was Rs. 524. The result of the finding of the Appellate Tribunal was that not merely the assessee's appeal stood rejected, but there was a finding making the position of the assessee worse, in that he was held entitled only to loss calculated at a difference between Rs. 524-6-0 and Rs. 225. It was held that the Tribunal could not have directed the Income-tax Officer to assess the assessee on the basis of the price of the share of Rs. 524-6-0, that what it could not do directly it could not do indirectly either, and that, therefore, it had no power to give a finding that the price of the share was only Rs. 524 for the purpose of directing the Income-tax Officer to re-assess the assessee on the basis of that price.

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1. (1945) 13 I.T.R. 272.
2. (1956) 31 I.T.R. 294.

A power to remand is not expressly given by section 33 (4). But such power is implicit in the words " pass such orders thereon ". Rule 28 confers the power of remand upon the Tribunal. On a reading of section 33 (1), together with rules 9, 12 and 27, it would be clear that the power of remand conferred on the Tribunal by rule 28 is only incidental to its power to hear and dispose of the appeal. If in an appeal the Tribunal could interfere in favour of the appellant, a remand could be made as incidental to that power, that is, for the purpose of giving relief to the appellant. But a power of remand could not be exercised so as to exceed the jurisdiction of the Tribunal under section 33 (1). We have already pointed out that the Tribunal has no jurisdiction to enhance assessment, except when there is an appeal by the Department itself. It would follow that it could not exercise the power of remand for the purpose of enhancing the tax.

Mr. Rama Rao Sahib, the learned counsel for the Department, placed considerable reliance on the decision in *Gajalakshmi Ginning Factory* v. *Commissioner of Income-tax*[1]. In that case, the assessee realised a profit of Rs. 13,197. The Income-tax Officer treated a sum of Rs. 3,800 under the head of income from the business. The Appellate Assistant Commissioner upheld the order of the Income-tax Officer in regard to the capital receipt, and reduced the assessment to Rs. 2,800. The assessee filed an appeal to the Appellate Tribunal, contesting the propriety of the assessment of even that sum of Rs. 2,800. The Tribunal remanded the matter to the Appellate Assistant Commisioner. On remand, the Appellate Assistant Commissioner held that both sums of Rs. 9,397 and Rs. 3,800 were assessable to tax as income from the business, that is, making the position of the assessee worse than what it was before he appealed to the Tribunal. A Bench of this Court, of which one of us (Rajagopalan, J.), was a party, held that the entire sum of Rs. 13,197 was a capital receipt, and it was, therefore, exempt from tax. But, incidentally, while considering the question of powers of the Appellate Tribunal, the learned Judges held that, even though no appeal was preferred by the Commissioner in respect of the portion of the order of assessment of the Income-tax Officer which contained an adverse decision against the Department, the matter having been remanded, it would be open to the Appellate Assistant Commissioner to deal with the whole of the assessment order of the Income-tax Officer, even to enhance the assessment, as under section 31 there was no distinction between the case where the Appellate Assistant Commissioner was dealing with the subject-matter which was remanded and the appeal which was heard by him in the first instance. As we have pointed out already, there may be cases where a remand has to be made for giving relief to the appellant himself. For example, an assessee may attack the entire basis of the assessment. The Appellate Tribunal in order to give relief to the appellant, might direct a remand. Once a remand is made, the power of the Appellate Assistant Commissioner on remand, unless restricted by the order of the remand itself, would be governed by the Provisions of section 31. That section, conferring as it does unlimited powers of assessment on the Appellate Assistant Commissioner, would enable him even to enhance the assessment. But such an enhancement could only be a fortuitous result of an order which was intended for the benefit of the appellant. The decision of *Sri Gajalakshmi Ginning Factotry* v. *Commissioner of Income-tax*[1], belongs to that category of cases.

That principle cannot apply to a case, where a remand is intended for the benefit of the respondent, or where it would inevitably result in a prejudice to the appellant. There can obviously be no power to remand in such a case. To recognise such a power would be to enable the Appellate Tribunal to do indirectly what it cannot do directly, that is, enhance the liability.

In the present case, there is no doubt that the result of the remand would be only, to enhance the tax, and it can never operate to the benefit of the appellant. We are of opinion that the order of the Tribunal is one passed without jurisdiction. The Tribunal has not yet decided the appeal before it on the basis of the grounds raised therein. We are of opinion that the Tribunal had no jurisdiction to direct the assessment to be

1. (1953) 1 M.L.J. 35 : I.L.R. (1953) Mad. 467 : 22 I.T.R. 502.

made on the Receivers under section 10 of the Indian Income-tax Act as an association of persons, and that it can only dispose of the appeal on the footing that there has been a proper assessment of the Receivers under section 41 of the Indian Income-tax Act. In the result, we answer the question referred to us in the negative, and in favour of the assessees. The assessees will be entitled to their costs. Advocate's fee Rs. 250

This case having been set down this day for being mentioned in the presence of the aforesaid advocates, the Court made the following

ORDER.—It was a consolidated reference that we answered based on sixteen separate applications preferred by the assessees under section 66 (1) of the Act. As the reference was answered in favour of the assessees we directed that they should get their costs. The learned counsel for the assessees now represents that the institution fee of Rs 1,600 paid by the assessees when they presented their applications under section 66 (1) of the Act to the Tribunal should be directed to be taxed as costs of the reference to enable them to recover that amount also from Revenue.

The first question that we have to consider, is, whether we have jurisdiction to issue such a direction in exercise of the powers vested in this Court by section 66 (6) of the Act, which declares that directions as to costs are within the discretion of Court. The learned counsel for the Department submitted that, as the amount in question represented the costs incurred by the assessees in the proceedings before the Tribunal and not in any proceedings in this Court, those costs would be outside the scope of any direction possible under section 66 (6) of the Act.

Before section 66 (1) was amended vesting in the Tribunal the jurisdiction to submit a reference to the High Court, it was the Commissioner that exercised a similar statutory power. At that stage also an assessee was required to deposit a fee of Rs. 100 when he required the Commissioner to submit a reference to the Court. That payment was treated as incidental to the reference itself, and it was taken as well-settled that the Court could in proper cases direct a refund of that amount to the assessee who succeeded in the reference. In *Commissioner of Income-tax, Burma* v. *J. I. Milne*,[1] Page, C.J., reviewed the position thus :

> " Now, it has been the practice of the Income-tax authorities in Burma to retain this fee of Rs. 100 whether or not a reference to the High Court is made under section 66 ; and if the matter had been free from authority I should have been inclined to think that the view taken by the Income-tax authorities was right . . . . . On the other hand the High Courts of Madras, Allahabad, Patna and Lahore have held that this fee of Rs. 100 is to be treated as part of the costs of the reference deposited by way of security, and for this reason it has been held that the fee forms part of the costs of and incidental to the reference which may be refunded to the assessee in the discretion of the Court under section 66 (6). In matters of procedure it is important wherever it is possible, that the practice of the High Courts should be uniform and we are not prepared to differ upon this matter from the Madras, Allahabad, Patna and Lahore High Courts. The result is that, in our opinion, the fee of Rs. 100, which must accompany an application for a reference under section 66 (2) forms part of the costs of or incidental to the reference which the Court in its discretion may award in a proper case to the assessee."

To mention only some of the cases, this Court directed such a refund in *Alagananda Mudaliar* v. *Commissioner of Income-tax*[2] ; *Commissioner of Income-tax* v. *Muhammad Ismail Rowther*[3] and *Commissioner of Income-tax, Madras* v. *Murugappa Chettiar*[4].

The principle, that the deposit of Rs. 100 made by the assessee, who seeks a reference under section 66 (1) of the Act, is incidental to the reference which is ultimately disposed of by the High Court, remains unchanged, even though the position now is that it is no longer the Commissioner but the Tribunal that is the statutory authority vested with the jurisdiction to submit a reference under section 66 (1) to the High Court. In *Chidambaram Chettiar* v. *Commissioner of Income-tx*[5], and in *Raghavalu Naidu & Sons* v. *Commissioner of Income-tax*[6], where the reference was by the Tribunal this Court directed, no doubt without any discussion, the refund to the assessee of the fee of Rs. 100 that the assessee had paid under section 66 (1) of the Act.

1. (1934) 2 I.T.R. 25.
2. (1940) 8 I.T.R. 69.
3. (1940) 1 M.L.J. 639 : I.L.R. (1940) Mad. 618 : (1940) 8 I.T.R. 150.
4. (1941) 1 M.L.J. 476 : (1940) 8 I.T.R. 292.
5. (1945) 1 M.L.J. 406 : I.L.R. (1946) Mad. 294 : 13 I.T.R. 177.
6. (1945) 1 M.L.J. 296 : I.L.R. (1946) Mad. 21 : 13 I.T.R. 194.

It may not be quite accruate to call it a refund if the costs are taxed and the Commissioner is directed to pay the institution fee to the successful assessee. The Commissioner never got the amount deposited with the Tribunal, and therefore no question of refund as such by the Commissioner could arise. If, however, it is the Tribunal that is directed to pay that amount to the assessee, it would be a case of refund. The real question is, whether the assessee who has succeeded in the reference can get back the amount he deposited with the Tribunal when he sought the reference under section 66 (1) of the Act. Who should be called upon to pay the amount to the assessee is only a question that affects the form of the order and not the substance. We are unable to accept the contention of the learned counsel for the Department that section 66 (6) does not vest a jurisdiction in this Court to give relief to the asessee and enable him to get back the institution fee. As we said, that payment was incidental to the reference, which commenced with the application preferred by the assessee under section 66 (1) of the Act and terminated with its disposal by this Court under section 66 (5). The Proviso to section 66 (1) enables the Tribunal to order refund in certain cases when the proceedings terminate before the Tribunal and do not come up before the High Court. When the reference does come up before the High Court and is finally disposed of there, section 66 (6) enables the High Court to deal with all the costs of the reference including what had been deposited with the Tribunal as the institution fee. The proper order, in our opinion, is to direct the Tribunal to refund that amount and continue the practice sanctioned by precedent in *Chidambaram Chettiar* v. *Commissioner of Income-tax*[1], and *Raghavalu Naidu & Sons* v. *Commissioner of Income-tax*[2].

There will therefore be a direction to the Tribunal to refund to the assessees the institution fee of Rs. 1,600.

V.S. *Reference answered in favour of the Assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Janaki Ammal and another .. *Petitioners**

v.

D. Rangachari .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), sections 12 and 18—Decision on Court-fee—When could be reviewed—Scope and extent of power.

Ordinarily there are three stages at which a Court can enquire into the question whether a plaint or appeal has been properly valued. They are : (*a*) Before the registration of the plaint or appeal. In such cases it will be open to the Court to review, correct and further review its decision in the manner specified in section 12 (1) of the Madras Court-fees Act; (*b*) After the suit or appeal has been registered an issue on the question of Court-fee can be raised by the defendant or respondent and the Court should decide the matter. In such cases the decision will be binding on the Court that rendered it unless a fresh decision is asked for by the Court-fee Examiner ; (*c*) On the objection of Court-fee Examiners under section 18 of the Act, when a decision has been given on the report of the Court-fee Examiner no further review or reconsideration is possible except by an appellate Court under section 12 (4) of the Act. A decision given under section 18 (2) of the Madras Court-fees and Suits Valuation Act, 1955, will be final so far as that Court is concerned. In the absence of a statutory provision expressly enabling the Court to review its decision, a decision on the question of Court-fee once given will be binding on the Court which gave the decision at all subsequent stages.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Tirunelveli, dated 3rd October, 1959, and made in A.S. No. 86 of 1958 (O.S. No. 33 of 1956, Sub-Court, Tuticorin).

S. V. Venugopalachari, for Petitioners.

V. Ramaswami, for the Government Pleader on notice from Court.

Respondent not represented.

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1. (1945) 1 M.L.J. 406 : I.L.R. (1946) Mad. 294 : 13 I.T.R. 177.

2. (1945) 1 M.L.J. 296 : I.L.R. (1946) Mad. 21 : 13 I.T.R. 194.

* C.R.P. No. 1606 of 1959.

4th May, 1960.
(14th Vaisakha, 1882—Saka.)

The Court made the following

ORDER.—This Civil Revision Petition raises a question as to the amount of Court-fee payable by the petitioners on the Memorandum of Appeal filed by them in A.S. No. 86 of 1958 on the file of the District Court, Tirunelveli, against the decree dismising their suit in O.S. No. 33 of 1956, on the file of the Sub-Court, Tuticorin.

The substantial reliefs sought by the plaint as amended are :

> " (a) that the first plaintiff is entitled to the properties described in Schedule A hereto and that the second plaintiff is entitled to the properties mentioned in Schedule B hereto by declaring that the documents, dated 2nd December, 1954, 27th January, 1955 and 16th February, 1955, are not binding as against the interests of the plaintiffs and setting aside the documents of 27th January, 1955, 2nd December, 1954 and 16th February, 1955 ; (b) for possession of the A Schedule property to the first plaintiff and the B Schedule property to the second plaintiff ; and (c) for mesne profits of the said properties from the date of plaint to the date of delivery of possession ".

The plaintiffs are the daughters, and the defendant, the son of one Kothai Ammal who died on 8th March, 1955. Their case is this. Kothai Ammal had substantial properties of her own, and under the documents, dated 9th January, 1945 and 22nd February, 1954, gave the plaintiffs certain properties which are specified in Schedules A and B to the plaint. Those documents though in the form of a will, in substance were deeds of settlement, or, at any rate, they resulted in a family arrangement which was accepted and acted upon by all the parties. While so, the defendant by the exercise of undue influence, coercion, etc., procured from Kothai Ammal a deed of settlement, dated 27th January, 1955, and the two documents of a testamentary nature bearing the dates 2nd December, 1954 and 15th February, 1955. The two plaintiffs being thus respectively entitled to A and B Schedule properties, the subsequent documents executed by Kothai Ammal would have no legal effect. Apart from the anterior title pleaded by the plaintiffs, there is no alternative case, *viz.*, that they are, the Stridhanam heirs of Kothai Ammal and that on setting aside the documents, dated 27th January, 1955, 2nd December, 1954 and 16th February, 1955, they would be entitled to recover possession of the properties from the defendant. Thus the plea that the defendant exercised undue influence and coercion over his mother while procuring the aforesaid documents, has no significance whatsoever in respect of the claim in the suit except that it provides a historical background of the circumstances under which they were executed. On the plaint as it stands the documents would have no legal effect, whether they were executed as a result of coercion or undue influence, exercised by him, or otherwise, as, on the dates they were executed, the deceased had no right to dispose of the properties set out in Schedules A and B. The plaintiffs not being assenting parties to the subsequent documents could sustain the suit for possession without a prayer for any declaration and or cancellation of the impugned documents. They could have ignored them. But they have asked for a declaration that the documents are not binding on them and for setting aside the same with a consequential relief of possession. The suit was valued at 30 times the kist payable on the A and B Schedule properties, and a Court-fee of Rs. 413-4-0 was paid. In Paragraph 25 of the plaint, it is stated that the Court-fee is paid under section 40 of the Court-fees Act. That is an obvious mistake : the suit is not valued under section 40 : the valuation and Court-fee paid could only have been under section 25 (a) of the Act. This valuation was adopted in the appeal. The Court-fee paid on the appeal was, however, reported to be insufficient by the Court-fee Examiner ; the objection was that as each of the plaintiffs had a separate cause of action, each in respect of her claim, Court-fee would be payable under section 25 (a) read with section 6 (3) as for two suits. Reliance was placed for this contention on the decision in *Venkatanarayana* v. *State of Madras*[1], and the judgment of this Court in C.R.P. No. 1812 of 1957. He, accordingly, assessed the Court-fee payable by the first plaintiff as Rs. 22-8-0 and that by the second plaintiff as Rs. 403-8-0 in all a sum of Rs. 426-0-0. There was, therefore, a deficit of Rs. 25-8-0 payable in respect of the suit and the appeal.

The matter was referred to the Court under section 18 (2) of the Court-fees Act. The learned District Judge accepted the objection of the Court-fee Examiner, and

1. (1953) 1 M.L.J. 231 : I.L.R. (1953) Mad. 655.

directed the plaintiff-appellants) to pay the deficit Court-fee of Rs. 25-8-0. The petitioners accepted the decision and paid the Court-fee as directed. Later, when the appeal came up for hearing, the learned District Judge appears to have thought that the valuation was incorrect and re-opened the question whether proper Court-fee had been paid on the appeal and in the suit. After hearing the appellant, the learned Judge held that, as the prayers in the plaint sought to set aside the two wills and a settlement executed by Kothai Ammal, the suit should have been valued under section 40 in regard to the setting aside the settlement deed, but that no additional Court-fee need be paid for the prayers relating to the two wills. The plaintiffs-appellants were thereupon directed to amend the valuation of the plaint and the memorandum of appeal and to pay the deficit Court-fee in both the Courts. The correctness of that order is challenged in this Civil Revision Petition.

I am of opinion that the lower Court was wrong both in regard to the procedure adopted as well as in the decision as to the Court-fee payable. The question whether the plaint and the Memorandum of Appeal have been properly stamped was raised by the Court-fee Examiner, and the learned Judge had decided on 22nd July, 1959, that the proper Court-fee was Rs. 426-0-0. Section 18 (2) states :

"Question raised in reports submitted by such Court-fee Examiners and relating to any suit, appeal or other proceeding pending in a Court shall be heard and decided by such Court ; and for the avoidance of doubt it is hereby declared that in hearing and deciding a question raised in any such report, it shall be lawful for the Court to review an earlier decision given by the Court on the same question."

What section 18 (2) contemplates is a decision and not a mere tentative opinion. In the absence of any statutory provison expressly enabling the Court to review that decision so as to call upon the appellant to revise the valuation and pay additional Court-fee, finality would attach to the decision so far as that Court is concerned. Mr. Ramaswamy, who appeared for the Government Pleader, attempted to show that under the Court-fees Act, 1955, there is unlimited power in the Court to review as often as necessary its decision on the question of Court-fee. The learned counsel relied on the provisions of section 4 which declares that " no document which is chargeable with fee under this Act shall be filed, etc., or acted on by any Court", and contended that so long as any document filed in Court is insufficiently stamped, the Court would have no jurisdiction to entertain it and that, therefore, there should be a power in Court to review its previous decisions till it arrived at the correct Court-fee payable. Such an argument would, if accepted, be subversive of the principle of finality of judicial decisions and would lead to unjust and inconvenient results. It is of utmost importance that questions relating to Court-fee should be decided finally and at the earliest stage of a suit or appeal. Section 4 directs the payment of Court-fee chargeable under the Act and the Act itself prescribes the procedure for settling disputed questions relating to the payment of proper Court-fee. Unless, therefore, a power is given under the statute a decision once given would be binding on the Court which gave the decision at all subsequent stages. It has to be seen whether the statute empowers the Court to decide and review from time to time decisions in regard to the Court-fee payable. Reliance was placed on section 12 which runs :

"12. (1) In every suit instituted in any Court other than the High Court, the Court shall, before ordering the plaint to be registered, decide on the materials and allegations contained in the statement, if any, filed under section 10 the proper fee payable thereon, the decision being, however subject to review, further review and correction in the manner specified in the succeeding sub-sections.

(2) Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim, but subject to the next succeeding sub-section, not later, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the Court's decision and the deficit fee shall be paid. If the plaint be not amended, or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such order as it deems just regarding costs of the suit.

(3) A defendant added after issues have been framed on the merits of the claim may, in the written statement filed by him plead that the subject-matter of the suit has not been properly valued,

or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim, and if the Court finds that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall follow the procedure laid down in sub-section (2).

Explanation.—Nothing in this sub-section shall apply to a defendant added as a successor or a representative in interest of a defendant who was on record before issues were framed on the merits of the claim and who had an opportunity to file a written statement pleading that the subject-matter of the suit was not properly valued or that the fee paid was not sufficient.

(4) (*a*) Whenever a case comes up before a Court of Appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon.

Explanation.—A case shall be deemed to come before a Court of Apeal even if the appeal relates only to a part of the subject-matter of the suit.

(*b*) If the Court of Appeal decides that the fee paid in the lower Court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it.

(*c*) If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appellant seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower Court, the deficit fee shall be recoverable as if it were an arrear of land revenue.

(*d*) If the fee paid in the lower Court is in excess, the Court shall direct the refund of the excess to the party who is entitled to it.

(5) All questions as to value for the purpose of determining the jurisdiction of Courts arising on the written statement of a defendant shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim.

Explanation.—In this section, the expression " merits of the claim " refer to matters which arise for determination in the suit, not being matters relating to the frame of the suit, mis-joinder of parties and causes of action, the jurisdiction of the Court to entertain or try the suit or the fee payable but inclusive of the matters arising on pleas of *res judicata*, limitation and the like."

Sections 13 to 15 provide for payment of additional Court-fee as a result of an issue framed, the option of the party to withdraw or give up that portion of the claim which requires the payment of additional Court-fee and the procedure in regard to cases where under the Act a written statement has to bear a Court fee. Sections 16 and 17 apply rules contained in sections 10 to 14 for the determination of Court-fee payable on appeals, petitions and applications. Section 18 provides for the appointment of Court-fee Examiners and for decision on their report.

The learned counsel, appearing for the Government, relying on section 12 (1), contended that the Court would have unlimited powers of reviewing, and further reviewing any order passed by it in regard to the proper Court-fee payable. I cannot agree. The power of review, further review and correction could only exist in the cases and to the extent specified in the succeeding paragraphs of the section. Sub-sections (2) and (3) of section 12 enable the original defendant and a subsequently impleaded defendant to raise the plea that the subject-matter of the suit has not been properly valued, or that the Court-fee paid is not sufficient. The sub-sections provide for a decision on the question of Court-fee as a preliminary issue. The terms of sub-section (3) and the *Explanation* thereto make it clear that even the defendant should take the plea only at the earliest opportunity. The review of the order determining Court-fee could, therefore, only arise by way of a decision of an issue on the question raised in accordance with section 12 (2) and section 12 (3). When the matter comes up before a Court of Appeal, such Court is given powers under section 12 (4) to consider the correctness of the decision by the subordinate Court. There is nothing in section 12 to confer jurisdiction on the Court to go behind any decision given by it on any issue relating to Court-fee. Independent of the power which a Court has under section 12, a decision could be given if the question is raised on the report of the Court-fee Examiner under section 18. That section expressly empowers the Court to decide the matter raised notwithstanding the fact the Court itself had decided the question before. Section 18 (2) is an exception to rule of finality that attaches to a judicial decision.

Ordinarily there are three stages at which Court can enquire into the question whether the plaint or appeal has been properly valued : (1) Before the registration of

the plaint or appeal. In that case, it will be open to the Court to decide, on the materials available in the plaint or memorandum of appeal, the fee payable, the decision being however subject to review, further review and correction in the manner specified in the succeeding sub-section [12 (1)]. (2) After the suit or appeal has been registered, an issue can be raised on that question, either by the defendant or respondent by taking objection to the sufficiency of the Court-fee paid. The Court should decide the matter. That decision will be binding on the Court that rendered it. (3) But even in such a case it would be open to the Court-fee Examiner to ask for a fresh decision under section 18. When the decision has been given on the report of the Court-fee Examiner, no further review or reconsideration is possible except by an appellate Court under section 12 (4). A decision given under section 18 (2) of the Court-fees Act, 1955, would be final so far as that Court is concerned.

It has been held that an interlocutory order in a suit which amounts to an adjudication and not merely an opinion, would be binding upon the Court which passes the order in the subsequent stages of the suit or proceeding. Vide *Parthasarathi* v. *Venkatadri*[1].

The learned District Judge has held that the finality could only affect the valuation and not the category under which a certain suit falls. Reference was made to the decision is *Nemichand* v. *Edward Mills Co.*[2], where it was held that the finality declared by section 12 of the Court-fees Act was limited to valuation pure and simple and not to the category under which a suit fell. The earlier order of the District Judge under section 18 should be deemed to have decided, the category of the suit, its valuation and the proper Court-fee payable. The finality of that order is not by virtue of section 12 but on general principle analogous to *res judicata*. I am, therefore, of opinion that the learned Judge had no jurisdiction to go behind his order dated 22d July, 1959, and call upon the plaintiffs to pay the additional Court-fee.

Nor can the order of the lower Court be justified on the grounds on which it was rested. For one thing the learned Judge was under a misapprehension that in seeking the reliefs contained in the plaint, the plaintiffs were representing their mother and as such bound to have the documents set aside as vitiated by undue influence, coercion, etc. No claim was based on inheritance to the estate of Kothai Ammal after setting aside or removing the obtacle created by the existence of the impugned settlement. It was unnecessary for the plaintiffs to set aside the impugned documents. It is a familiar principle that it is the substance and not the form of the plaint that should decide the Court-fee payable, and that it would not be open to a plaintiff to camouflage the reliefs in an attempt to evade payment of proper Court-fee. If, therefore, under the substantive law, it is necessary for a party to set aside a transaction before obtaining the relief prayed, the Court would imply that there was a prayer to set aside the transaction or direct an amendment of the plaint to that effect so as to levy the proper fee. It is equally settled that where it is unnecessary to set aside a transaction, no such prayer can be implied or required to be taken. Even where there is such a prayer, it is considered as unnecessary or a mere surplusage. (Vide *Y.G. Gurukul* v. *Y. Subrahmanyam*.[3] A reading of the plaint would show that the plaintiffs based their title to the suit properties not as heirs of their mother, but as settlees under a previous settlement or arrangement.

Mr. Ramaswami, however, contends that even if a plaintiff prays for a wholly unnecessary relief, it is obligatory on him to pay Court-fee on the reliefs prayed. Reliance was placed in this connection on the observations of Viswanatha Sastriar, J. in *Narasamma* v. *Satyanarayana*[4], to the effect that even where a party was not bound to have a decree set aside, yet if he chose to ask for that relief, he should pay Court-fee thereon. The decision in that case was based on rule 2 of the rules framed under the Suits Valuation Act. In *Rajamannar*, In re[5], the rule was held not to affect the classification of suits provided for in the Court-fees Act. A mere suit for declaration to

1. A.I.R. 1929 Mad. 121.
2. (1953) 1 M.L.J. 117 : (1952) S.C.J. 674 : 1953 S.C.R. 197 : A.I.R. 1953 S.C. 28.
3. (1956) An. W.R. 553.
4. (1951) 1 M.L.J. 436 : I.L.R. (1951) Mad. 751.
5. (1953) 1 M.L.J. 676 : I.L.R. (1953) Mad. 572 (F.B.).

have a compromise decree set aside where no consequential relief was prayed for was held not to come under section 7 (*iv-A*) of the Old Court-fees Act.

Section 40 of the Court-fees Act, 1955, corresponds to section 7 (*iv-A*) of the Court-fees Act, 1870. That provides for a special class of suits where cancellation is sought by a person who was a party to the document or derived title under a party to the document. Strangers who are not bound by the document need not ask for cancellation. If, however, they pray for setting aside of a document on the ground that they were not bound by it, such prayer would not be one coming within section 40 but merely declaratory in nature.

In the present case, the plaint prays for a declaration that the documents dated 2nd December, 1954, 27th January, 1955 and 15th February, 1955 are not binding on the interest of the plaintiff, for setting aside the same, and for possession of the properties. Two of the document are wills and the learned Judge has held that they need not be set aside. As regards the third, the plaintiffs do not claim as the successor-in-interest to Kothai Ammal by virtue of a title acquired subsequent to the document; it was not obligatory on them to set aside the same. But at the same time, the reliefs prayed for could not be held to be meaningless. For example, a person who may not be bound by a document executed, by another may have an apprehension that if left outstanding it may injure his interests. The nature of such suits have been considered in *Muppudathi Pillai* v. *Krishnaswami Pillai*[1]. Section 39 of the Specific Relief Act enacts that any person against whom a written instrument is void or voidable, may sue to have it adjudged accordingly. The prayer in the present suit relating to the declaration and setting aside are of that description. The substantive relief in such a case is declaration and the relief as to setting aside is a superfluous one. Venkatasubba Rao, J., dealing with a similar relief in *Kattiya Pillai* v. *Ramaswamia Pillai*[2], observed,

"is not a relief which it is the duty of the plaintiff to sue for but it is the duty of the Court to grant."

The declaration sought is coupled with a prayer for possession. On the terms of the plaint, the prayer for possession is consequential on the declaration and it would follow that the suit and the appeal will have to be valued as one under section 25 (*a*).

If substantially the plaint is one for cancellation under section 39 of the Specific Relief Act, a question might arise whether in addition to the payment of a Court-fee under section 25 (*a*), the plaintiff should pay Court-fee for declaration in respect of the two wills dated 2nd December, 1954 and 15th February, 1955. In the view I have taken of the finality of the decision under section 18 (2) so far as the appeal in the lower Court is concerned, it is unnecessary to decide that point. The Court-fee paid on the appeals before the lower Court should be taken as correct. The Civil Revision Petition is allowed : no costs.

R.M. *Petition allowed.*

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1. (1950) 2 M.L.J. 225.
2. (1929) 56 M.L.J. 394 at 397.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Express Newspapers Ltd., "Club House", Mount Road, Madras .. *Appellant**

v.

The State of Madras, represented by the Collector of Madras .. *Respondent.*

Land Acquisition Act (I of 1894), section 48—Scope—Withdrawal of acquisition proceedings—Compensation payable to the owner—Principles in fixing.

The common law doctrine itself of 'damnum absque injuria' is irrefutable in its import, but the statute providing for compensation for compulsory acquisition came into existence upon this very ground and section 48 of the Land Acquisition Act specifically provides for compensation for withdrawal where there has been a temporary deprivation of enjoyment by the owner in any sense.

The reference to notice in section 48 (2) is to section 4 (1) notification only. Since the effect of section 24 sub-clause (7) is undoubtedly to inhibit the erection of buildings etc. on the property subsequent to section 4 (1) notification, the loss due to the inability to execute such plans should legitimately be included in the term 'damages' occurring in section 48 (2).

The words 'in consequence of' in section 48 (2) should be interpreted to include all effects which are clearly to be referred to the cause of pending acquisition and remote consequences which are not directly related to the cause should be excluded. Fanciful plans which were never contemplated, possible uses of the property which were not practicable and fantastic claims upon such a foundation can have no place in assessing damages under section 48 (2).

To delimit section 48 (2) in a rigid fashion to actual and incidental costs incurred by the owner would be to destroy the concept of compensation altogether. Though compensation for losses ought to be claimed upon a basis of realism and adherence to fact nevertheless it has never been the law that such compensation cannot be conjectural in certain respects. It will be inevitably so if factors such as special adaptability, special market value, injurious affection or damages for severance are taken into consideration.

Duty of the owner and the Government in placing relevant evidence relating to the compensation and of the Court in fixing it pointed out.

Appeal under section 54 of the Land Acquisition Act, 1894, against the order of the Court of Small Causes at Madras, dated 20th July, 1955 in Land Case No. 22 of 1954.

K. V. Venkatasubramania Aiyar, M. Ranganatha Sastri and *V. Kumaraswami,* for Appellant.

The Government Pleader and *R. G. Rajan,* for Respondent.

The Court delivered the following judgments :

Anantanarayanan, J.—This appeal is directed against the judgment of the learned Chief Judge of the Court of Small Causes in Land Case No. 22 of 1954, which was a claim by Express Newspapers Limited, against the Government represented by the Collector of Madras, under section 48 (2) of the Land Acquisition Act. The claim was rejected by the Court below except for an amount of Rs. 4,871-4-0 allowed as compensation payable for actual costs incurred by the claimant in connection with the acquisition. In view of the importance of the subject-matter, and as the research of learned counsel for the appellant (Sri K. V. Venkatasubramania Aiyar) and the learned Government Pleader has failed to bring to our attention any authorities directly bearing upon section 48 (2), or the principles with reference to which compensation should be assessed under that section, we propose to deal with the facts and the law at some length.

The broad facts are that the land or site bearing R.S. Nos. 315/2 and 315/3, measuring about 8 grounds and situated on the eastern boundary of the old Madras Club premises, abutting General Patters Road, was notified for acquisition under section 4 (1) of the Act on 30th September, 1948, as required for widening the Woods Road. On 4th November, 1948 the appellant (Express Newspapers Limited) intimated to Government (Exhibit R-2), in response to notices issued under sections 4 (1) and 5 (A) of the Act, that there was no objection to the acquisition, provided that due compensation was allowed, including damages for severance. The declaration under section 6 of the Act was on 25th January, 1950. Under Exhibit

* Appeal No. 560 of 1955.

21st January, 1960.
(1st Magha, 1881—Saka).

R-7 dated 1st April, 1952, the appellant demanded damages, including Rs. 5,000 towards legal charges. The date of the notice under sections 9 and 10 of the Act is 26th April, 1952. Subsequently on 22nd January, 1954, it was decided to drop the acquisition proceedings (Exhibit C-10) in view of the cost, and the formal notification under section 48 (1) of the Act was published in the *Fort St. George Gazette*, dated 10th March, 1954.

The claim of the appellant before the Land Acquisition Officer, was for Rs. 8,10,871-4-0 made up of the following items: (1) damages for loss of income from the property, upon the most favourable outlay, during the pendency of acquisition Rs. 7,12,500-0-0; (2) damages for construction of temporary accommodation, as building plans were held up due to the intended acquisition Rs. 87,500; (3) damages for actual expenses incurred Rs. 10,871-4-0. The total claim in Court was for Rs. 8,73,481-12-5 item (2) having swelled up to Rs. 1,50,110-8-5. The learned Judge negatived items 1 and 2, holding that the building plans appear to have been abandoned even prior to the section 4 (1) notification, and that there was no credible evidence to substantiate the alleged loss of revenue. Upon item (2), the learned Judge held that the intended acquisition could not possibly have interfered with the construction for which the temporary building was substituted, and that the claim was unacceptable. With regard to the loss claimed for expenses (Rs. 10,871-4-0), an actual sum of Rs. 4,871-4-0 was allowed, as already stated. We shall hereafter refer, in due context, to certain particulars of the oral evidence, and documents which appellant was able to make available to Court, in support of the claim.

For the time being, we are concerned with the far more important question of principle. The crux of the question argued before us was whether, with reference to the language of section 48 (2) of the Act, the principles governing the assessment of compensation for compulsory acquisition should be applied, *mutatis mutandis*, to cases of withdrawal from such acquisition. If those principles were applicable, how far could they be pressed into service in an assessment of compensation which would have to be inevitably and largely conjectural, was another question. The argument of learned counsel for the appellant (Sri K. V. Venkatasubramania Aiyar) was, briefly that by virtue of the section 4 (1) notification, a certain deprivation of the possible use of the land hung over the owner of the property. This was because, under section 24, sub-clause (7) of the Act, no outlay or improvements could be effected on the land acquired, without the sanction of the Collector, after the date of the notification under section 4 (1). In the instant case, the appellant had elaborate plans for constructing buildings upon this valuable property within the City, for being rented as shop-fronts, or for commercial purposes. But, since the property was to be acquired for widening a road, no such buildings could be put up for the period of the acquisition, which was from 30th September, 1948, to 10th March, 1954, upon the admitted facts. The sanction of the Collector could not be procured, as it was not unlikely that any such sanction would have been accorded. Hence, the damages resulting from this loss of revenue, are claimed to be a very legitimate part of the compensation payable under section 48 (2). Learned counsel also makes reference to the report of the Select Committee (dated 2nd February, 1893), when this section was enacted in 1894, wherein they stated :

> "We think, therefore, that the power to withdraw should be given after as well as before, the award, but that if so exercised, it should only be on terms of the most liberal compensation to the owner, and that, if he is not satisfied with the Collector's offer, he should have the same rights of reference to the Judge as in case of acquisition."

We shall refer, in due course, to the very elaborate arguments of learned counsel in explanation of this core of his thesis, illustrated by numerous citations from Indian, English and American authorities.

But the learned Government Pleader contends, *per contra*, (1) that the 'notice' referred to in section 48 (2) of the Act, can apply only to the notice under section 9 of the Act, and not to the notification under section 4 (1). (2) That the words in section 48 (2) "compensation due for the damages suffered by the owner in conse-

quence of the notice or of any proceedings thereunder " must be strictly construed, both with reference to common law, and the connotation of expressions such as " damages " " suffered " "in consequence of " occurring in the case-law upon compulsory acquisition. In other words, the argument is that " damages " must be limited to actual costs incurred, or to reparation for actual and specific injury. According to the learned Government Pleader, nothing conjectural is relevant here, and the principles relating to compensation for special adaptability of land, special market value, injurious affection or severance, have no place here. Again, the words " in consequence of the notice " must be strictly construed, to include within their scope only direct and tangible consequences in costs or expenses ; all indirect results, or anything which is of the nature of an hypothetical loss must be excluded. Since no authority upon this section has been brought to our notice, and the arguments appear to us to be of great importance, both to Government and to private parties whose properties may be proposed for acquisition in future, we shall first deal with the arguments of the learned Government Pleader as submitted before us.

These arguments have been advanced against the background of the well-known common law doctrine of *damnum absque injuria*, namely, that where

> " there is no *jus*, no legal right to demand that the act which causes the damage shall not be done, an action for damages is not maintainable." (Broom's " *Legal Maxims* " 10th Edition, page 120).

The broad principle is stated in Halsbury's " *Laws of England*" 3rd edition Vol. 10, section 1, page 5 as follows :

> " A mere negative prohibition, though it involves interference with the owner's enjoyment of property, does not, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

Again :—

> " No owner of lands appropriated by statutes for public purposes is entitled to compensation either for value of the land taken or for damage on the ground of injurious affection to his land, unless he can establish a statutory right."

The following authorities are relied upon in support : *France Fenwick & Co* v. *The King*[1], *The Master and Fellows of University College, Oxford* v. *The Secretary of State for Air*[2], *East Free Mantle Corporation* v. *Annois*[3], *Attorney General* v. *D. Royal Hotel Ltd.*[4] These authorities make it explicit that, at common law, the private individual cannot recover against the State any compensation even for compulsory acquisition of property, except as provided by statute, for there is no remedy against a lawful act, nor can damages be awarded for suffering anything authorized by law. This is upon stronger ground, in the case of a withdrawal from contemplated acquisition, even though the subject might have been affected in the enjoyment of his property during the pendency of the proceedings. The following passage occurs in Sedgwick on " *Damages* " 9th edition, section 1160 :

> "As a general rule it has been held that the right to discontinue is absolute, and the property may be abandoned without incurring any liability for damages............But there is no doubt that great injustice is often suffered in this way ; for, while the proceedings are pending, the land may be rendered unavailable for any purpose............To meet this difficulty, the Court sometimes imposes terms, and in some cases special statutes provide for indemnity."

When we look at the law in the United States, it is abundantly clear from passages in Nichols' " *Eminent Domain* ", Vol. I, page 66, that withdrawal from condemnation proceedings will not entitle the owner of property to damages, unless the statute makes special provision, as *damnum abseque injuria* would otherwise apply. In " *American Jurisprudence* ", Vol. 18, " *Eminent Domain* " section 371, page 1013 the position is set forth in the following terms :—

> "There is a conflict of authority as to whether the property owner is entitled to recover his expenses, or the loss or damage he may have incurred, on account of the institution or prosecution of condemnation proceedings which are thereafter abandoned. A majority of the cases take the view, in the absence of statute imposing liability............(that) the damage which he suffers by reason of proceedings subsequently abandoned does not give rise to an action on his part, but is *damnum absque injuria.*"

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1. L.R. (1927) 1 K.B. 459.
2. L.R. (1938) 1 K.B. 648.
3. L.R. (1902) A.C. 213, 217.
4. L.R. (1920) A.C. 509.

But it is certainly arguable that section 48 (2) was specially enacted for this purpose, realising the great disability that owners of property would otherwise suffer from, due to deprivation of enjoyment or dominion during the pendency of acquisition proceedings, which might be subsequently abandoned. But the learned Government Pleader presses the further argument that such damages must be concrete and not conjectural, and must be the direct consequence of something done by authority. His stand before us is that section 4 (2) of the Act refers to various steps which the authority could take, after entering upon the land, for which payment for damages is subsequently provided for under section 5 of the Act. Upon this ground, he would construe the language of section 48 (2) as referring only to the section 9 notice, and, would thus exclude the linking of section 48 (2) with the deprivation of enjoyment which undoubtedly results from the operation of section 24, sub-clause (7) of the Act after the section 4 (1) notification. In thus construing the words "damages suffered" and "in consequence of", in a very strict fashion, to include only costs or concrete expenses directly resulting from the threatened acquisition, and nothing else, the learned Government Pleader seeks to support himself upon certain authorities, which we might immediately turn to.

In *Harvey* v. *Crawley Development Corporation*[1], in awarding damages of £241 10s 1d for actual expenditure incurred in shifting premises due to acquisition, Romer, L.J., observed :

> "The authorities to which our attention has been drawn establish that any loss sustained, by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided, first that it is not too remote, and secondly that it is the natural and reasonable consequence of the dispossession of the owner."

We might here also refer to section 23, sub-clause (5), which relates to reasonable expenses for a change of residence compelled by acquisition. The damages must be a direct consequence of the injury (vide *Thurogood* v. *Van Den Berghs & J.L.D.*[2] The learned Government Pleader also refers to *D. Johnston* v. *Secretary of State for India*[3], in which it was held that no compensation need be awarded for delay in acquisition proceedings.

With regard to the directness of causation, related to the words "in consequence of" occurring in section 48, reference is made to the following passage in Maynes' '*Treatise on Damages*" 11th edition, page 44 :

> "Inadmissible grounds of damage may be classed under the general head of remoteness. Damage is said to be remote when, although arising out of the cause of action, it does not so directly flow from it that the offending party can be made responsible for it."

The remarks of Lord Esher, M. R., upon this matter in *Pink and others* v. *Fleming*[4] are cited in support. Reference has also been made to *Thurogood* v. *Van Den Berghs*[2], and *Harvey* v. *Crawley Development Corporation*[1]

But, after giving our most careful consideration to this line of reasoning, we are unable to accept that it sustains the interpretation of section 48 (2) which the learned Government Pleader would seek to advance. The common law doctrine itself of *damnum abseque injuria* is irrefutable in its import, but the statute providing for compulsory acquisition came into existence upon this very ground and it specially provides for compensation for withdrawal where there has been a temporary deprivation of enjoyment by the owner in any sense. We are unable to accede to the submission that section 48 (2) cannot refer to the notification under section 4 (1) ; on the contrary, since the effect of section 24, sub-clause (7) is undoubtedly to inhibit the erection of buildings, etc., on the property subsequent to section 4 (1) notification, we have no doubt whatever that the loss due to the inability to execute such plans, should be legitimately included in the term "damages" occurring in section 48 (2) . We would agree upon the authorities cited, that the words "in consequence of" should be interpreted to include all effects which are clearly to be referred to the cause of pending acquisition ; we would agree that re-

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1. (1957) 1 All.E.R. 504.
2. L.R. (1951) 2 K.B. 537.
3. L.R. (1918) 42 I.C. 905.
4. 59 N.S.Q.B.D. 559.

mote consequences, which are not directly related to the cause should be excluded. We would further agree that fanciful plans which were never contemplated, possible uses of the property which were not practicable, and fantastic claims upon such a foundation, can have no place in applying section 48 (2) to the facts. But, on the contrary, and as we shall show when turning to the aspect of the arguments developed by learned counsel for appellant (Sri K. V. Venkatasubramania Ayyar) to delimit section 48 (2) in a rigid fashion to actual and incidental costs incurred by the party would be to destroy the concept of compensation altogether. Though compensation for losses ought to be claimed upon a basis of realism and adherence to fact, nevertheless, it has never been the law that such compensation cannot be conjectural in certain respects. On the contrary, it will be inevitably so, if factors such as special adaptability, special market value, injurious affection, or damages for severance are taken into consideration. The authorities amply bear out that they have been taken into consideration, and we are unable to see any reason why, *mutatis mutandis*, the principles are not applicable to the special case of section 48 (2) as well. We would certainly agree that, as far as the law in this country is concerned, purely speculative schemes, which were never capable of realisation, ought not to be considered as a basis. Vide *Basavaraju Krishna Rao* v. *Head Assistant Collector, Bezwada*[1]. *In the matter of Government and Sukhanand*[2], *Johnston* v. *Secretary of State for India*[3], and *B L. Elias* v. *Secretary of State*[4].

The very conception of compensation for compulsory acquisition involves two elements : (1) the value of the property ; (2) as damages for injury. As stated in Halsbury Simonds Edition, 3rd Edition, Vol. 10, page 161, Paragraph 280, compensation itself :

> " is commonly determined by the ordinary rules applicable to damages in actions of tort."

As laid down in *Prem Chand* v. *Collector of Calcutta*[5] :

> " The fairest and most favourable principle of compensation to the owners is that......... what is the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of."

That potential value would be included goes without saying ; *see* 10 Halsbury 3rd Edition, Paragraph 157. Special adaptability is dealt with in the same work, at Paragraph 158 (page 95) and compensation should also be awarded upon the basis of a special suitability to a lucrative purpose. In *Ripley* v. *Great Northern Railway Company*[6], compensation was claimed for loss of prospective profits with regard to supply of water to the buildings which would have been erected, if the land had not been taken, and was allowed. There is, indeed, a plethora of authorities upon this aspect, of which we think it is sufficient to refer to the following selected cases : *Cedars Rapids Manufacturing Power Company* v. *Lacoste and others*[7], *Fraser and others* v. *City of Fraserville*[8], In re *an Arbitration between Lucas and the Chesterfield Gas and Water Board*[9], *Sideney* v. *North Eastern Railway Company*[10]. It can be easily be shown that conjectural value would be perfectly relevant, upon the following authorities. In *Victoria Laundary (Windsor) Ltd.* v. *Newman Industries Ltd.*[11], compensation was allowed upon a basis of conjectural volume of business. In the two following cases relating to ship collisions, namely, *The Argentino*[12], and *Owners of Steampship 'Mediana'* v. *Owners Master and Crew of Lightship Comet*[13], special damages were awarded in respect of loss of profits on projected voyage, and the argument was repelled that damages should be limited to actual costs of repair. In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste and others*[7], damages were awarded on the basis of the agricultural value of the land acquired, while the claimant put forward the theory that he should be compensated as a partner in the projected enterprise for which

1. (1912) 15 I.C. 672.
2. (1909) I.L.R. 34 Bom. 486.
3. (1918) 42 I.C. 905.
4. A.I.R. 1929 Cal. 20.
5. (1876) I.L.R. 2 Cal. 103 at 108.
6. 31 Law Times 869.
7. L.R. (1914) A.C. 569.
8. L.R. (1917) A.C. 187.
9. L.R. (1909) 1 K.B.D. 16.
10. L.R. (1914) 3 K.B. 629.
11. L.R. (1949) 2 K.B. 528.
12. (1888) L.R. 13 Probate 191.
13. L.R. (1907) A.C. 113.

the land was acquired. The Privy Council remitted the case to the Arbitrator, because conjectural elements were also permissible.

Brown v. *Commissioner for Railways*[1], is particularly instructive, as the jury gave verdict of compensation on the basis of the supposed existence of coal under the land acquired, and the Privy Council observed that the Government was under a duty to place before the jury all the evidence upon this aspect.

We think that we have sufficiently indicated, with reference to the authorities and the discussion set forth above, the true principles which ought to apply to the fixation of compensation under section 48 (2) of the Act for withdrawal from compensation proceedings. The very fact that, under section 48 (1) of the Act, such withdrawal has to necessarily take place before possession is taken of the land, is sufficient to dispose of the argument that the damages should really be related to concrete injuries sustained by actual acts of possession by the authorities, or merely to incidental costs. On the contrary, we have no doubt that the assessment of compensation would include conjectural claims through uses to which the property could have been put, and income derived therefrom, but from which the owner was prevented, by the pending acquisition. The principles applicable to compulsory acquisition, such as compensation for special adaptability, etc., will apply, *mutatis mutandis*, to a case of withdrawal also. But we would certainly emphasise the note of caution, in applying the principles to the given facts of a situation. The claim must be founded upon realism, upon the hard core of fact, though it may be inevitably conjectural, to a certain extent. If the owner claims that there was a paricular income-yielding use to which he could have put the property, he must adduce the materials to prove this, and to prove that this was perfectly practicable. Even otherwise, compensation can be awarded upon the basis of a rent which the owner could have obtained, and did not obtain due to pending acquisition proceedings. But grandiose schemes, not related to practicability or fact, ought not to be taken account of by Courts in awarding such compensation. The owner must also prove the other elements necessary for substantiating his claim, such as the demand for the property, or for buildings therein during the period covered by the proceedings,etc. It is impossible to adumbrate all the relevant considerations, what is essentially a question of fact. We can only make clear the guiding principles which Courts should bear in mind.

We cannot help observing that the evidence tendered by the appellant in the Court below was thoroughly inadequate and unsatisfactory. The proprietor of Express Newspapers Limited, Sri R. Goenka, who was the person best fitted to throw light upon the actual schemes and the loss, even if conjectural, which he sustained, did not examine himself. The documentary evidence is meagre and unsatisfactory, while the two witnesses actually examined for the appellant, G. Gopalachari (C.W. 1) and T. S. Subramania Iyer (C.W. 2) prove little or nothing in substantiation of item 1 of the claim, amounting to over 7 lakhs. But, on the contrary, we are unable to accept the argument that Government had no duty in the matter, and that they could wait the proof of claim in complacency like a defendant, and without assisting the Court by all the materials at their command. See *In the matter of Government and Sukhanand*[2]. Nor can we consider the disposal of this claim by the lower Court as satisfactory and adequate. The mere dismissal of the claim of the appellant as unsubstantiated by evidence, would certainly not imply that the Court has no duty to fix the quantum of compensation payable under section 48 (2) independently, and upon the materials avalilable, and by all the means in its power.

For these reasons, we are setting aside the order of the lower Court, and remitting the entire matter for fresh disposal, in the light of the principles and observations that we have set forth above. The claimant (appellant) is certainly bound to place all adequate material for a proper assessment of the claim, and the best evidence in the possession of the appellant, including the oral testimony of the proprietor, who might

1. L.R. (1890) 15 A.C. 240.
2. (1909) I.L.R. 34 Bom. 436.

alone be able to throw light upon the actual basis of the claims. The Government is equally bound to adduce material for a proper assessment of the compensation, upon the declared principles. The Government cannot merely maintain the position that, failing the attempt by the claimant to prove a particular figure as due, there is no duty cast upon the Government to assist the Court to arrive at a true valuation. We would also observe that this is a matter of importance in which the rights and interests of the subject are concerned, and that Government cannot indefinitely prolong proceedings for compulsory acquisition, and ultimately withdraw, and then claim that the deprivation or inhibition caused by such pendency is of no account in assessing compensation. Costs to abide the result.

The Court-fee paid will be refunded to the appellant.

Ramaswami, J.—I entirely agree with the luminous exposition, if I may say so with respect, of my learned brother and wish only so reinforce his observations regarding two matters, *viz.*, that the compensation for damages suffered must exclude hypothetical building schemes. It has been frequently laid down in regard to acquisition, and which principles apply to compensation under section 48 also, that while the owner is entitled to be compensated at the highest rate for which he can sell the land for the most remunerative purposes for which it can be utilised, he is not entitled to be compensated for potential values when the opportunity for making such use of the land for purposes which might create these potential values is so remote as to be negligible. Although land may possess certain potentialities, it does not follow that these potentialities have any present value. The value to the owner consists of the advantages which the land possesses, present or future, but it is the present value alone of such advantages which has to be determined. The true test is to consider whether there is a demand in the locality for building sites independently of the proposed acquisition. In short, the principle that a owner is entitled to the market value of the property not according to its present disposition but laid out in the most lucrative way in which he can dispose of it, was applied in Bombay even to hypothetical building schemes and in the extraordinary developments which it assumed there, where future utility was not estimated merely by prudent business calculations and mere speculation was allowed to have a large influence and which was finally discredited even there, never found favour in Madras. In *Basavaraju Krishna Rao* v. *Head Assistant Collector, Bezwada*[1], (a Madras case) it was laid down that an award cannot be made on mere speculation and hypothetical schemes regarding the future development of land. In fine it must not be a case of an Alnacher dream come true.

The next consideration which has to be borne in mind is that as the evidence stands at present, the evidence tendered by the appellant in the Court below was thoroughly inadequate and unsatisfactory and further investigation has to be made by the learned City Civil Judge in the light of the observations made by my learned brother in the penultimate and last paragraph of his judgment.

V.S. ——— *Remanded for fresh disposal.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

Sri Thirumalasubbu Chettiar .. *Appellant**

v.

Srimathi Rajammal .. *Respondent.*

Contract Act (IX of 1872), sections 69 and 70—" Bound by law to pay "—If applies to legal or contractual liability—Sale with direction to discharge mortgage—Whether creates a trust in favour of the vendor in respect of unpaid consideration.

Where a purchaser of property *A* [subject along with another property *B* to a usufructuary mortgage] with a direction to discharge the entire mortgage and deliver possession of property *B*

1. (1912) 15 I.C. 672.

* S.A. No. 20 of 1947.

26th April, 1960.
(56th Vaisaka, 1882—Saka).

to the vendor, redeems only property *A* by paying a portion of the mortgage-money and the purchaser of property *B* from the vendor redeems and recovers possession and sues the vendee of property *A* for recovery of money paid by him for redemption with interest,

Held : (i) That to spell out a trust by reason of a direction to the purchaser to pay the consideration and discharge a debt due, is farfetched and that the ingredients of a trust were not present.

(ii) that the words " bound by law to pay " in section 69 of the Contract Act cover obligations of contract or tort or any other obligation which is an effective bond in law, and that the plaintiff, being interested in the payment of money, because without such payment he could not obtain possession of the property which he had purchased, is entitled to be reimbursed by the defendant.

Kunchithapadam Pillai v. *Palamalai Pallai*, (1916) 32 M.L.J. 347, held to be not good law after the decision in *Govindram Gordhanda Saksaria* v. *State of Gondal*, (1950) 2 M.L.J. 1 : L.R. 77 I.A. 156 (P.C.).

Appeal against the Decree of the Court of the Subordinate Judge of Dindigul, in A. S. No. 36 of 1955, preferred against the Decree of the Court of the District Munsif of Dindigul in O.S. No. 249 of 1953.

S. Srinivasachariar and *N. T. Raghunathan*, for Appellant.

T. Raghavan, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal originally came on for hearing before Subrahmanyam, J., who considered that it was necessary to have an authoritative ruling by a Bench of this Court on the question which arose in the case. The facts have been set out by the learned Judge in his order of reference and may briefly be mentioned :

The properties described in Schedules A and B belonged to two brothers, Nagappa and Angappa. Both of them usufructuarily mortgaged the properties under Exhibit A-1 on 20th September, 1924, in favour of two persons, Eswara Nagasubramania Iyer, and Sambamoorthy Ganapatigal for a sum of Rs. 3,000. Nagasubramania Iyer assigned his share in favour of one Subramania Ganapatigal on 3rd October, 1939. One Ramanathan Chettiar obtained a money decree against the two brothers, Nagappa and Angappa, and in execution of that decree purchased the properties in 1928 subject to the usufructuary mortgage. After this purchase Ramanathan Chettiar sold the properties described in Schedule A to the defendant for Rs. 3,000 under a sale-deed, dated 5th April, 1948. It was provided in and by that sale-deed that the said consideration of Rs. 3,000 should be paid by the defendant to redeem the usufructuary mortgage and after taking possession of the properties from the mortgagees she should deliver possession of the properties in B Schedule to the vendor, Ramanathan Chettiar. The defendant, however, actually paid Rs. 1,500 to the usufructuary mortgagee and took possession of the A Schedule properties. Ramanathan Chettiar sold the B Schedule properties to the plaintiff under a sale-deed, dated 20th January, 1950, for Rs. 2,750. The properties were sold free of encumbrances evidently because of the provision in the sale-deed to the defendant that she should discharge the entire debt of Rs. 3,000. The plaintiff could not obtain possession of the properties because they were still in the possession of the mortgagee. As the defendant had not discharged the debt in full the plaintiff was obliged to pay the balance of Rs. 1,500 to the mortgagee and to obtain possession of the properties in Schedule B. Thereafter the plaintiff filed the suit out of which the present Second Appeal arises for recovery of Rs. 1,500 which he had paid to the mortgagee with interest at 5½ per cent. per annum from the date of payment. The learned District Munsif of Dindigul who tried the suit granted a decree to the plaintiff as prayed for but on appeal the learned Subordinate Judge, Dindigul, allowed the appeal and dismissed the suit, holding that the plainiff must be deemed to be a volunteer and his remedy, if any, must be against his vendor and that sections 69 and 70 of the Contract Act had no application to the facts of the case. He relied on the observations in *Kunchithapadam Pillai* v. *Palamalai Pillai*[1], that the expression "bound by law to pay" in section 69 of the Contract Act referred to a legal liability and not to a contractual liability. In the Second Appeal that came up before Subrahmanyam, J., he was in

1. (1916) 32 M.L.J. 347.

clined to agree with the learned Subordinate Judge that section 69 of the Contract Act had no application to the facts of the case in view of the observations in *Kunchitapatham Pillai* v. *Palamalai Pillai*[1]. At the same time the learned Judge, apparently impressed by the justice of the plaintiff's claim, was inclined to hold that a trust was created in respect of the sum of Rs. 3,000 which was the consideration for the sale in favour of the defendant which had to be applied to redeem the B Schedule properties: Ramanathan Chettiar was the author of the trust. The defendant was the trustee and Ramanathan Chettiar was also the beneficiary. The obligation was to apply that part of the money to redeem the B Schedule properties and deliver them to Ramanatha. The plaintiff obtained a transfer of Ramanathan's beneficial interest under the trust as per the sale-deed in his favour and as such he could recover the money. The learned Judge was obviously not prepared to decide the case on this footing and considered that it was better to have the point decided by a Bench of this Court.

With great respect to the learned Judge we are unable to discover any of the ingredients of a trust. To spell out a trust created by Ramanatha in his own favour by reason of his direction to the purchaser to pay the consideration and discharge a debt due by him is farfetched.

At the same time we are clearly of the opinion that the plaintiff's claim is well-founded. The learned Judge Subrahmanyam, J., took the view that the decision in *Kunchithapadam Pillai* v. *Palamalai Pillai*[1], conclusively negatived the plaintiff's claim under section 69 of the Contract Act. That case actually dealt with a question on the interpretation of section 82 of the Transfer of Property Act. There, the owner of a mortgaged property had sold portions of the property to three different purchasers directing each one of the purchasers to pay a particular sum of money to discharge the mortgage. The mortgage was not discharged and there was a suit by the mortgagee. That debt was eventually discharged by the three purchasers. One of the purchasers brought a suit for contribution against the other purchasers alleging that he had paid more than he was bound to pay under his sale-deed. All that was held in that case was that the liability to contribute under section 82 of the Transfer of Property Act was founded on the liability relating to the property and did not rest on personal obligation. In that case the learned Judges were not inclined to uphold the plaintiff's claim on the basis of the provisions of sections 69 and 70 of the Contract Act. The relevant observations of the learned Judges are these :

> "To our mind the obvious inapplicability of the Contract Act sections arises from the consideration that the plaintiff in this case cannot be said to have paid anything which the other was "bound to pay". What is intended is a contractual obligation and not a legal one. It is argued that a person is bound by law to pay his contracted debts ; and in one sense this is true ; But we are inclined to think that that it is not what was intended by the section."

These observations cannot avail the defendant after the pronouncement of the Privy Council in *Govindram Gordhanda Seksaria* v. *State of Gondal*[2]. Their Lordships there laid down that the words 'bound by law to pay' in section 69 of the Contract Act do not exclude those obligations of law which arise *inter partes* whether by contract or tort and are not confined only to those public duties which are imposed by statute or general law. They extend to any obligation which is an effective bond in law. In the words of their Lordships "to say that the payment made by the plaintiff in this case is a voluntary payment appears to involve some misuse of language". Their Lordships referred to the authority of the Courts in India to hold that the words 'bound by law' cover obligations of contract or tort. We respectfully accept this interpretation. We are, therefore, of the opinion that the plaintiff's claim can be sustained under section 69 of the Contract Act as all the requirements of section 69 of that act are satisfied. The plaintiff was interested in the payment of money, because without such payment he could not obtain possession of the property which he had purchased. This amount which he paid, the defendant was bound

1. (1916) 32 M.L.J. 347. 2. (1950) 2 M.L.J. 1 : L.R. 77 I.A. 156 (P.C.).

by law to pay because he had undertaken to pay it under the sale-deed relating to the property in the A Schedule. The plaintiff is, therefore, entitled to be reimbursed by the defendant.

The next question which arises is, even assuming that the plaintiff is entitled to maintain the action and the defendant is liable what is the quantum of liability. The defendant pleaded that he was entitled to the benefits of the Madras Act IV of 1938. The plea that is raised in Paragraph 9 of the written statement is this :

"Contrary to the right of depositing the scaled down amount as per section 9-A of the Madras Agriculturists Relief Act, the plaintiff has no reason what ever to pay Rs. 1,500 on 14th August, 1950, in respect of the said amount. The plaintiff is not bound to pay the said amount to the said usufructuary mortgagee as per law. Therefore the aforesaid person is not entitled to collect the said amount from the defendant. If the debt incurred on the aforesaid 20th August, 1924, is scaled down not more than Rs. 200 need be paid for it on 14th August, 1950."

The learned District Munsif overruled this plea of the defendant. But the learned Subordinate Judge did not give any final finding on the point because of the view he took, namely, that the plaintiff's suit should fail. This matter must, therefore, be disposed of. There appears to be some dispute as to the actual applicability of the provisions of the Madras Act IV of 1938 on several grounds. All these must be gone into.

In the result the Second Appeal is allowed and the appeal is remanded to the file of the learned Subordinate Judge who shall decide the second point set out in the judgment under appeal, namely, whether the defendant is entitled to the benefits of Madras Act IV of 1938. There will be no order as to costs. The appellant will be entitled to a refund of Court-fee paid on the memorandum of appeal.

K.L.B. — *Appeal allowed and the case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

P. Abdul Subhan & Co. .. *Petitioner**

v.

The State of Madras represented by the Secretary, Revenue Department, Government of Madras and another .. *Respondents.*

Madras General Sales Tax (Turnover and Assessment) Rules, 1939, *rule* 16 *as amended in* 1955—*If invalid as opposed to Article* 304 *of the Constitution of India.*

Constitution of India (1950), *Articles* 301 *and* 304—*Scope of—Discriminatory taxation—When prohibited.*

Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules as re-enacted in 1955 under G.O. (P.), No. 2733, Revenue, dated 3rd September, 1955, does not contravene Article 304 (*a*) of the Constitution of India and is valid.

Article 304 (*a*) of the Constitution of India which prohibits discriminatory taxation could not be construed in such a manner which will have the effect of nullifying the freedom of inter-State trade guaranteed under Article 301 of the Constitution of India. Article 304 (1) contemplates a ban on all heads where discriminatory taxation is possible as otherwise the freedom of inter-State trade guaranteed under Article 301 could be fettered by taxation. Having regard to the object of the two Articles in the Constitution no discriminatory power of taxation is vested in any State on goods imported from other states either at the point of import or at any subsequent stage. No State could levy tax on goods, having its origin in a different State, at any stage of its existence in the former State so as to discriminate it from goods of similar kind manufactured or produced therein.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be

* W.P. No. 400 of 1957 and C.M.P. No. 5527 of 1959. 1st December, 1959. (10th Agrahayana, 1881—Saka.)

pleased to issue a writ of *certiorari* calling for the records and quashing the Order, dated 23rd November, 1956, in A. 4-3774/55-56 on the file of the Deputy Commercial Tax Officer, Gudiyatham, North Arcot District.

M. K. Nambiyar for *T. S. Krishnamoorthy Iyer*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Government Pleader (*K. Veeraswami*), for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This petition is filed under Article 226 of the Constitution for the issue of a writ of *certiorari* or other appropriate writ, calling for the records and quashing the order, dated 23rd November, 1956, in A-4-3774/55-56, on the file of the Deputy Commercial Tax Officer, Gudiyatham.

The petitioner-firm is a licensed dealer in hides and skins. In the course of its business, raw skins from places within and outside the State are purchased, tanned and the tanned skins exported to foreign countries. For the year 1955-56, the second respondent, the Deputy Commercial Tax Officer, Gudiyatham, made an assessment on the petitioner on the basis of the re-enacted rule 16 of the Turnover and Assessment Rules, under the Madras General Sales Tax Act of 1939, on a turnover of Rs. 8,23,513-14-0. The legality of the assessment is challenged in this petition by impugning the constitutional validity of rule 16 of the Turnover and Assessment Rules.

Section 3 (1) of the Madras General Sales Tax Act makes it obligatory on every dealer to pay a tax for each year on the total turnover (which is to be determined in accordance with rules prescribed in that behalf) at the rate specified in the section. The 'term turnover' as defined in the Act is the aggregate amount, for which goods are bought or sold. Section 3 (1) would, if unrestricted, enable a levy of sales tax on as many occasions as there are sales by dealers of particular goods, resulting in a what is called a multi-point levy. Section 3 (3) exempts a dealer whose turnover is less than Rs. 10,000, in any year from payment of sales tax for that year. There are also exemptions and reductions in respect of the taxes leviable on certain goods. Section 5 enumerates them. In two cases there is a total exemption, and in four others a multi-point levy was avoided by prescribing a single point in the series of sale transactions which the goods may undergo within the State. Section 5 (vi) relates to the levy of tax on the sale of hides and skins, modifying the otherwise multi-point liability into a single point one, the point in the series of sales being left to be prescribed by the rules. Section 19 confers powers on the State Government to make rules prescribing the determination of the turnover and fixation of the point of levy in regard to cases of single point levy. Accordingly the State Government framed the Turnover and Assessment Rules of 1939, which came into force on 1st October, 1939. Those rules have been amended, repealed and re-enacted from time to time.

Rule 16 of the Turnover and Assessment Rules framed in 1939 provided for the levy of taxes on tanned and untanned skins by licensed and unlicensed dealers. Since then in three decisions of this Court certain defects in rule 16 were brought to light. Rule 16 (5) which did not give the benefit of single point levy to unlicensed dealers, was declared invalid as contrary to section 5 (vi), the assessable turnover was held not to include purchases from unlicensed dealers, and the transactions by unlicensed dealers were held not taxable as no point of levy was fixed. The result was that under the Rules the unlicensed dealer escaped taxation while the licensed dealer had to pay it. The Rules had therefore to be revised. Some months before this issue of the new Rules, it was made obligatory on all dealers in hides and skins to take out licences. The new rule 16 which took the place of the old, was made by G.O. (P) No. 2733, Revenue, dated 3rd September, 1955. That runs:

"16 (1) In the case of raw hides and/or skins the tax under section 5-A (iv) shall be levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3 (3) on the amount for which they are bought by him.

(2) (i) In the case of hides or skins which have been dressed outside the State the tax under section 5-A (iv) shall be levied from the dealer who in the State is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him.

(ii) In the case of dressed hides or skins which have been dressed within the State, the tax under section 5-A (iv) shall be levied from a person who is the first dealer in such hides and skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him :

Provided that, if he proves that the tax has already been levied under sub-rule (i) on the raw hides and skins out of which the dressed hides and skins had been produced, he shall not be so liable.

(3) The burden of proving that a transaction is not liable to taxation under this rule shall be on the dealer."

A comparative study of the old and the new rules shows that essentially there has been no change in the system of taxation since 1939 in respect of hides and skins. They have been treated as one commodity whether tanned or untanned. The rules proceed to fix only the point at which the tax has to be levied; under the present Rule tax is levied at the point of the last purchase of the untanned skins in the State or on the first sale of tanned skins in the State, with an exemption in case tax was paid on the skins, while they were in untanned condition. The new Rules have remedied the defects noticed in the old, and as dealers in hides and skins are now obliged to take out licences the anamoly of a licensed dealer paying the tax while an unlicensed dealer escaped it is avoided. It is the validity of the new rule that is impugned in this petition.

Mr. M. K. Nambiar, the learned advocate for the petitioner, contended that the new rule would be invalid as the operation of it would result in discriminatory taxation. Two cases in which it was alleged there would be discrimination are :

(i) There would be discrimination in the matter of sale of tanned hides and skins between the goods that are tanned within the State and those that are tanned outside the State and brought into the State, the tax on the former being less than on the latter. That is because tanned hides and skins cost more than they cost in their untanned condition. It is stated that, normally, a tanned skin cost 70 per cent. more than an untanned skin. Therefore, in respect of a skin tanned in the State a dealer would be liable to tax only on the basis of purchase price of the raw skin, while, in regard to a skin tanned outside the State and brought and sold within the State, the dealer would be bound to pay tax on the value of the tanned goods, which would be 70 per cent. more than its price in raw condition.

(ii) even in regard to skins tanned in the State, there would be difference in the tax between a case where the raw skins are purchased inside the State and the case where the same quantity is purchased outside the State. In the former case, the dealer sales would be liable to tax according to their purchase price; while in the latter case no tax would be payable on the raw skins purchased from outside the State, but when the purchaser tans and sells the same he would be liable to pay tax on the sale of the tanned skins, which would result in a turnover higher than what a dealer who bought the raw goods inside the State would be taxed on. It is, therefore, contended that, the effect of the new rule 16 is to discriminate between cases where goods were manufactured or produced within the State and those where they were manufactured or produced outside the State.

Article 304 (1) (*a*) of the Constitution which provides for safeguards in respect of inter-State trade and commerce, runs :

304 (1) "Notwithstanding anything in Article 301 or Article 303, the Legislatures of a State may by law—

(*a*) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured ; or produced ;"

It was urged on behalf of the petitioner that rule 16 being deemed a part of the Sales Tax Act, would amount to a legislation imposing a discriminatory tax on goods imported from other States, and should therefore be declared invalid. On the other hand, the learned Advocate-General, appearing for the respondents, contended thus: Article 304 did not affect taxation in respect of sale of goods within a State, in respect of which the State Legislature had plenary powers under Article 246 (3) read with List 2 to the Seventh Schedule of the Constitution. A sales-tax which is levied

on the occasion of a sale within a State could not be conceived in any sense as a tax on the goods of another State, and even if there be any discrimination in the levy of a sales tax with respect to sales in a State, it could not properly come within the ban imposed by Article 304 (*a*). Article 304 (*a*) could only relate to taxes imposed on goods when they are imported from other States or by reason of importation, but once that stage is past, the goods become the goods in the taxing State and there would be no limitation on the powers of the State Legislature to tax sale of those goods. Article 304 (*a*) does not by itself authorise a taxation for which authority has to be found only in Article 246. Reliance was placed on the observation of Venkatarama Iyer, J., in *Sundararamier & Co.* v. *State of Andhra Pradesh*[1], who while considering List II of the Seventh Schedule to the Constitution observed that taxation, etc., is dealt with only in Entries 45 to 68, and that Entries 1 to 44 deal with subjects in which there could be legislation on other matters. On that basis, if one were to scrutinise the Entries 45 to 68 in List II of Schedule VII, the appropriate article to which Article 304 (*a*) could be correlated would be only Item 51 which runs :

"Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(*a*) alcoholic liquors for human consumption ;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics ; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry ".

What, therefore, Article 304 (*a*) intended to prescribe was that the countervailing duties on goods imported from other States should not exceed the excise duty on goods manufactured or produced in the State.

We are not, however, prepared to place such a limited or narrow interpretation of Article 304 (*a*). That article occurs in Part XIII of the Constitution which deals with trade, commerce and intercourse within the territory of India and should *prima facie* comprehend every kind of disability which would be imposed by the legislature of a State on the sale of the products of other States. Article 301 declares that inter-State trade, commerce and intercourse would be free subject to the provisions following in that part. Taxation is a recognised means of giving protection and preventing free trade. Article 304 (*a*) should not, therefore, be so construed as to nullify practically the declaration contained in Article 301. Neither the terms of Article 304 (*a*) nor the context of the law prior to the Constitution would support the contention.

Section 297 (1) (*b*) of the Government of India Act, 1935, imposed restrictions in respect of legislative, as well as executive action of the Provinces, in regard to inter-provincial exports and imports and also imposition of discriminatory taxes as against the goods produced or manufactured in other Provinces. Section 297 (1) (*b*) of that Act stated :—

"No Provincial Legislature or Government shall—

* * * * * *

(*b*) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced, in the Province and similar goods not so manufactured, or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality ".

The Government of India Act, 1935, did not contain a guarantee of free trade like Article 301 under the Constitution. The prohibition imposed by section 297 (1) (*b*) limited only the powers of legislature, etc., of the Provinces and not of the Centre. That section prohibited discriminatory tax by a Province as against the goods produced or manufactured in other Provinces, and such prohibition was not confined to import taxes alone. In *Bharat Automobiles* v. *State of Assam*[2], the validity of a provision in the Assam Sales Tax Act, 1947, namely, section 29, arose for

1. (1958) S.C.J. 459 : (1958) 1 M.L.J. (S.C.) 179 : (1958) 1 An. W.R. (S.C.) 179 : (1958) S.C.R. 1422 : 9 S.T.C. 298.
2. (1957) 8 S.T.C. 537.

consideration. Under that section, a dealer, who would not be liable to tax on the sale of goods if he had obtained the same within the Province, was made liable to a tax in respect of the goods obtained outside the Province.

The learned Judges held that that provision contravened section 297 of the Government of India Act, and observed at page 547 :—

"The tax, therefore, which purports to be levied on the dealer who sells goods obtained from outside the State, under section 29 of the Act is, in substance, a tax on these goods, and directly attracts the inhibitions prescribed by section 297 of the Government of India Act, 1935, or Article 304 of the Constitution, because of its discriminatory character in favour of goods produced or manufactured in the State. I am, therefore, constrained to hold that section 29 of the Act is *ultra vires*."

That was a case where there was no tax liability on the sale of goods having their origin in that Province, while the tax was imposed on goods bought from outside the Province. Section 297 of the Government of India Act, 1935 was not understood in the limited sense now contended for but was held to invalidate a discriminatory sales tax based with reference to the origin of the goods. Under the Constitution inter-State free trade is placed on a firmer footing in the declaration in Article 301, and even Parliament cannot interfere with free trade except in a very limited class of cases. The decision of the Assam High Court dealt with a case where there was no levy of tax on indigenous goods while one was imposed on sale of goods brought from another State.

The same principle would apply to a case where the rate of tax on the goods having their origin in a State is different from the rate of tax levied on goods bought from outside the State, for a higher tax on the latter class of goods would impede their free flow.

Article 304 (*a*) prohibits levy of any tax of discriminatory character as between the goods manufactured or produced in the State and those imported from outside that State. The words 'manufactured or produced' would exhaust all categories of goods that can be found in a State other than the goods imported and should be understood as contradistinguished from goods imported from outside the State. They cannot be limited to goods in respect of which excise duty can be levied. The words 'any tax' would seem to indicate that it was a term of wide import not confined to excise duty alone. It was contended by the learned Advocate-General that the words 'any tax' should be governed by what followed, that is, 'goods manufactured or produced' and should therefore be taken to mean only excise duties. If that were so, there would be no necessity for Article 304 (*a*) at all, as Article 246 read with Schedule VII, List II, Entry 51 would itself enable a State Legislature only to impose countervailing duties on goods imported from other States at rates not exceeding those levied on similar goods manufactured or produced in that State. Independent of Entry 51 there are other entries in that list which would authorise a taxation by the State, *e.g.*, 52 to 58. Independent of Entry 51 it is possible to conceive of a State being anxious to levy a higher tax on goods from other States. It would be a reasonable construction of the Article 304 (1) to hold that it contemplated a ban on all heads where discriminatory taxation was possible, as such a construction would advance the object and prevent the mischief sought to be prohibited by Article 301.

Article 301 deals with the freedom of inter-State trade. Its undoubted purpose is to preserve the economic integrity of India by facilitating and providing for free flow of trade and commerce between the States. In the *State of Bombay* v. *R.M.D. Chamarbagwala*[1], S. R. Das, C.J., observed :—

"Our Constitution also proclaims by Article 301 the freedom of trade, commerce and intercourse throughout the territory of India subject to the provisions of Articles 302 to 305 which permit the imposition of reasonable restriction by Parliament and the State Legislature. The underlying idea in making trade, commerce and intercourse with, as well as within, the States free undoubtedly was to emphasise the unity of India and to ensure that no barriers might be set up to break up the national unity".

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1. (1957) S.C.J. 607 : (1957) 2 M.L.J. (S.C.) (Cr.) 558. 87 : (1957) 2 An.W.R. (S.C.) 87 : 1957 M.L.J.

The ordinary conception of a free trade would imply that it should be without any barriers, and that there should be no special levy on the imported goods so as to place the goods of other States passing into a State for sale in a comparatively disadvantageous position as against the goods manufactured or produced by that State. In *Kutti Keya* v. *The State of Madras*[1], the word ' free ' is interpreted to mean,

" In its technical acceptation freedom from economic restrictions such as duties which one State levies on goods passing into it from, or out of it into, other State ".

Mr. K. Rajah Iyer quoted the following definition of free trade by Prof. Bastable in Palgraves ' Dictionary of Political Economy, Vol. II, page 143 :

" Free trade is that system of commercial policy which draws no distinction between domestic and foreign comomodities and, therefore, neither imposes additional burdens on the latter nor grants any special favours to the former ".

That clearly is the sense which the words bear in Article 301 in so far as it relates to inter-State trade.

From the definitions extracted above it is plain that impediments and barriers for free trade need not be solely confined to barriers at the stage of import. Taxation or other impediments with reference to the origin of the goods at subsequent stages after import might well impede free trade. For example, if a tax is levied on the sale of goods brought from other States at a very much higher rate than that levied on sale of local goods it would be uneconomical for the person to sell the goods brought from outside and would inevitably impede free flow of trade within India.

Article 301 prohibits barriers of any kind which would stand in the way of free inter-State trade and commerce. Barriers can take various forms. There may be direct legislation prohibiting or restricting entry of goods from other States. Indirect barriers can also be created by taxation. Article 303 relates to the former category, while Article 304 would relate to the latter. In *The State of Bombay* v. *The United Motors, India, Ltd.*[2] Patanjali Sastri, C.J., observed at page 1081 :—

" It will be seen that the principle of freedom of inter-State trade and commerce declared in Article 301 is expressly subordinated to the States ' power of taxing goods imported from sister States, provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State Legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State-power of imposing ' any ' non-discriminatory tax on goods imported from sister States ".

Again at page 1087 the learned Chief Justice of India observed :

" It is, however, reasonable to suppose that this particular form of protection to inter-State trade and commerce provided in Article 286 (2) was not intended to have a wider operation than what is contemplated in Part XIII which declares the general principle of freedom of inter-State commerce and defines the measure of constitutional protection it should enjoy. If such protection is intended to give way before the State-power of taxing goods imported from sister States, subject only to the condition against discrimination, it is legitimate to suppose that the ban under Article 286 (2) should not operate so as to nullify that power. True, Article 304 (*a*) deals with the restrictions as to imposition of tax on goods, while Article 286 deals with the restrictions as to imposition of tax on sales or purchases of goods ".

Bose, J., observed at page 1102 :

" I am with respect unable to agree that Article 286 (2) is to be interpreted in the light of Article 304 (*a*). In my opinion, the two articles deal with different things. Article 286 is concerned with sale and purchases, while Article 304 relates to goods imported from other State. The stress in the one case is on the transaction of sale or purchase ; in the other on the goods themselves and on the act of import. Article 286 is related to Entry No. 54 of List II and to Entries 41 and 42 in the List I. Article 304 (*a*) to Entries 26 and 27 of List II read with Entry 33 in List III and to Entries 51, 52 and 56 of List II. The distinction is, I think, clear."

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1. (1954) 1 M.L.J. 117 : A.I.R. 1954 Mad. 621.
2. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : 1953 S.C.R. 1069.

It is clear from the observations of the learned Judges of the Supreme Court that freedom of inter-State trade can be fettered by taxation, and that Article 304 (a) related also to items other than Item 51 of List II.

Article 304 (a) prevents discrimination in the matter of taxation between the goods manufactured or produced in the State which is legislating and goods brought into that State from outside. Tax on goods in a State can be levied in two ways: (1) at the point of manufacture or production which is known as excise duty, or (2) at any later stage, as in the case of sales tax. There is no limitation in Article 246 as regards the time at which a State Legislature can tax the goods. Therefore goods though not manufactured or produced in a State could be taxed after they come into the State. It is undoubted that a power should exist in a State to tax goods which are brought into it from outside. In *State of Bombay* v. *United Motors, India, Ltd.*,[1] it is observed :

> "Does the principle of freedom of inter-State commerce require that a State should foster such commerce to the detriment of domestic trade ? It is one thing to avoid impeding inter-State commerce by imposing discriminatory burden upon it which internal trade does not have to bear but quite another to place local products and local business at a disadvantage in competition with outside goods and dealers. It would be a curious perversion of the principle of freedom of inter-State commerce to drive local custom across the border to outside dealers and that in our opinion could not have been contemplated."

But that power should be limited in the wider interests of the country and its unity. Article 304 (a) is, therefore, intended to safeguard the right of a State to tax goods coming into it from other States. But, at the same time, in conformity with the declaration made in Article 301, it states that the tax levied on goods brought into it from other States shall not be higher than what the State imposes on the goods, either manufactured or produced, by it. Having regard to the object of Articles 301 and 304, no discriminatory power of taxation should be vested in a State, either at the point of import or at a later time. To permit levy of discriminatory tax at a stage subsequent to the actual importation of goods from the other States would, as pointed out before, have as great a retarding effect on free inter-State trade as a levy made by way of import duty. In our opinion, it would not be open to any State to levy a tax on goods having its origin in a different State at any stage of its existence in the former State so as to discriminate it from goods of a similar kind manufactured or produced therein.

The question, however, remains whether rule 16 has a discriminatory effect, as contended by the learned advocate for the petitioner. To ascertain whether there has been any discrimination the substance of the rule, and not the form, has got to be looked into. In our opinion rule 16 is based on the principle of single point levy of tax and prescribed points for the levy according to the circumstances in which a sale may take place in the State and not on any principle with reference to the origin of the goods. Section 14 (3) of the Central Sales Tax Act of 1956 (Act LXXIV of 1956) also treats hides and skins, whether dressed or raw, as a single commodity. To bring it under the taxing provisions of the Sales Tax Act, it is necessary that a point in the course of its sale in the State will have to be fixed. It may happen that goods are bought in other States and brought into the States. The purchase having been completed outside the State cannot be taxed. If subsequently a sale takes place inside the State in the tanned or untanned condition, a point for levy has to be fixed. There would therefore be a necessity for fixing alternative points, so that sales of either tanned or untanned skins might be brought within the Sales Tax Act. In the case of untanned hides and skins, the point is fixed at the last purchase in the State. In the case of tanned hides and skins, the point is fixed at the first sale by the tanner, with exemption in a case where he has paid tax on the skins in their raw condition. Since skins, tanned or untanned, constitute only one class of goods, and the sale of that class of goods can be taxed only at a single point, obviously there can be no tax on a sale of tanned goods, if tax has already been paid on an earlier transaction when those skins were untanned ; thus in substance the points

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : 1953 S.C.R. 1069.

of levy on transactions in untanned skins and tanned skins are mutually exclusive. The points fixed are not with respect to the origin of the goods, but with respect to a single point available to the State in the circumstances of a case. That no exemption would be available where the goods were tanned outside the State is due to the fact that the goods were not in existence in the State at an earlier stage and no tax could be levied while there was a sale in its raw state. Further, the tax on the sale of tanned hides and skins is not only on those imported from other States. Even in regard to hides and skins produced in this State, if no tax was levied or leviable in their raw state, the assessment will be made only on the basis of its sale after being tanned. By way of illustration, let us take for instance a case where a dealer is not liable to assessment by reason of the turnover in raw hides and skins bought within the State being less than Rs. 10,000 ; if he tans them and the tanned goods are sold and the turnover therein exceeds Rs. 10,000 he would be liable to tax on the price of the tanned goods sold. Take again a case where a tanner owns a flock, slaughters, skins and tans, all within the State he would be liable to pay only on the tanned goods as there was no purchase by him of untanned hides and skins. The levy on the sale of untanned goods is therefore not only in respect of goods bought outside the State but would also be in respect of the goods in the State. Therefore two points of taxation alternatively fixed in rule 16 would apply irrespective of the place of origins of the goods according to the earliest point in the sale available for taxation.

In that view, it is unnecessary to consider whether even if Article 304 (*a*) were to apply, Article 305 would validate the rules as the Madras General Sales Tax Act was an existing law within the latter Article ; or whether a rule under the enactment could be deemed to be a statute law within the meaning of Article 304 (*a*).

In our opinion, rule 16 as re-enacted does not contravene Article 304 (*a*) and is valid.

Even before we took up this case for delivering judgment, the learned counsel for the petitioner brought to our notice that in C.M.P. No. 5527 of 1959 permission had been sought to raise additional grounds. When the Writ Petition itself was heard and judgment reserved, it was not brought to our notice that the petitioner proposed to rely upon the additional grounds to raise which permission was sought in C.M.P. No. 5527 of 1959. But this morning when we took up the case for delivering judgment which had been prepared, the learned counsel pointed out that orders had to be passed in C.M.P. No. 5527 of 1959 and that if permission is granted a decision would have to be given on the basis of the additional grounds also. The questions raised in C.M.P. No. 5527 of 1959 are identical with those in other petitions which stand posted to 21st October, 1959 for disposal. Therefore, further proceedings in this case will stand adjourned to 21st October, 1959.

This case along with C. M. P. No. 5527 of 1959 coming on for further hearing along with *K. M. Mohamed Abdul Khader* v. *State of Madras*[1] W.A. No. 40 of 1958 and W.P. No. 282 of 1957 on Thursday the 12th and Friday the 13th day of November, 1959 and having stood over for consideration till this day ; the Court made the following

ORDER.—In our judgment in W.A. No. 40 of 1958[1] in which we considered W.P. No. 400 of 1957 also, we upheld the validity of rule 16 of the Turnover and Assessment Rules, the only point reserved for decision. In accordance with our directions in that judgment we direct that this petition be dismissed and rule *nisi* be discharged. The respondent will be entitled to his costs. Counsel's fee Rs. 250 as fixed in the consolidated judgment in W.A. No. 40 of 1958, etc.

R.M. *Petition dismissed.*

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1. Since reported in (1960) 2 M.L.J. 416 : I.L.R. (1960) Mad. 623.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Appellate Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE JAGADISAN.

S. RM. AR. S. SP. Sathappa Chettiar .. *Appellant**

v.

Umayal Achi and another .. *Respondents.*

Madras High Court Original Side Rules, Order 17, rule 15—" Inaccuracy"—Meaning of—If includes supervening inaccuracy.

The word ' inaccuracy ' in Order 17, rule 15 of the Madras High Court Original Side Rules, is no doubt wide and is intended to cover cases not governed by the other words namely, clerical or arithmetical error occurring therein. Clerical or arithmetical errors connote something which is manifest on the face of the record and the word ' inaccuracy ' in the rule should be interpreted in the light of the preceding words ' clerical or arithmetical error '. Hence if there is no inaccuracy manifest on the face of the record, just like clerical or arithmetical error, the Court has no jurisdiction to act under the rule. A supervening inaccuracy, *viz.*, one which renders the original order inaccurate by reason of a subsequent amendment, cannot be one manifest on the face of the record and cannot be amended under the rule.

On appeal from the Order of the Hon'ble Mr. Justice Ganapatia Pillai dated 18th April, 1958 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application No. 196 of 1958 in C.S. No. 311 of 1951.

V. C. Gopalarathnam and *P. S. Sarangapani Ayyangar,* for Appellant.

V. Tyagarajan and *T. Venkatadri,* for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—C.S. No. 311 of 1951 on the file of the Original Side of this Court was a suit instituted by one Sathappa Chettiar against one Ramanathan Chettiar for partition and separate possession of a half share of alleged joint family properties described in Schedules B, C and D attached to the plaint and for rendition of accounts in respect of the joint family assets and for other appropriate reliefs usual and incidental in partition actions. For purposes of Court-fee the plaintiff valued the claim for accounts at Rs. 1,000 under section 7 (iv) (*f*) of the Court-fees Act and paid an *ad valorem* Court-fee of Rs. 112-7-0. In regard to the relief for partition a fixed Court-fee of Rs. 100 was paid purporting to be under Article 17-B (Madras) of Schedule II of the Court-fees Act. For the purposes of jurisdiction the plaintiff however gave the value as Rs. 15 lakhs. The value of Rs. 15 lakhs was arrived at by valuing the entire properties covered by the Schedules to the plaint at Rs. 30 lakhs and computing the value of the half share claimed by the plaintiff at half that value, namely, Rs. 15 lakhs. The office of the High Court took exception to this mode of valuation adopted by the plaintiff for purposes of Court-fee, and the matter was referred to the Chamber Judge, Krishnaswamy Nayudu, J., who by his order dated 18th October, 1951, held that the Court-fee paid by the plaintiff was correct and sufficient.

Previous to the institution of the suit the plaintiff's father one Subbayya had filed a partition suit against the same Ramanathan Chettiar and had entered into a compromise with him and released his claims after receiving due consideration therefor. The plaintiff's contention in the suit was that the said compromise entered into by his father with the defendant Ramanathan Chettiar was not valid and binding on him.

The suit was tried by Ramaswami Gounder, J., who held that there was a fair and *bona fide* settlement of the dispute by the plaintiff's father acting as the manager of his branch, and that the plaintiff was bound by the compromise decree. The learned Judge accordingly dismissed the suit on 22nd September, 1953.

The plaintiff Sathappa Chettiar presented a memorandum of appeal on 1st December, 1953, against the said judgment and decree. On that memorandum he paid the same Court-fee as he did for the plaint. The Office raised objection

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* O.S.A. No. 46 of 1958. 16th March, 1960.
(26th Phalguna, 1881—Saka).

about the sufficiency of the Court-fee paid and ultimately the matter was referred to a Division Bench consisting of Satyanarayana Rao and Rajagopalan, JJ. The learned Judges held[1] that the suit and the memorandum of appeal should be valued under the provisions of section 7 (iv) (*b*) of the Court-fees Act, and that neither section 7 (*v*) of the Act nor Article 17-B of Schedue II of the Act was applicable. The plaintiff (appellant) was directed to mention his value for the relief of partition, as it was incumbent upon him to do so under the provisions of section 7 (iv) (*b*) of the Act.

In compliance with this order the appellant (plaintiff) valued the relief to enforce partition of the joint family properties in the suit at Rs. 50,000 and paid the deficit Court-fee of Rs. 1,662-7-0 and re-presented the memorandum of appeal on 7th May, 1954.

But the troubles of the appellant in the matter of payment of Court-fee were not over. The Office took a further objection on the ground that the appellant (plaintiff) was precluded from giving a fresh valuation under section 7 (iv) (*b*) of Rs. 50,000 inasmuch as he had already valued the claim for purposes of jurisdiction in the plaint at Rs. 15 lakhs. In effect the plaintiff (appellant) was called upon to pay an *ad valorem* Court-fee on Rs. 15 lakhs compelling him to adopt that as the notional valuation under section 7 (iv) (*b*) of the Act. This position was disputed by the appellant with the result that the matter was again placed before another Division Bench consisting of Rajagopalan, J., and one of us, who heard the matter. The view was then taken[2] that it was not open to the appellant to adopt a fresh valuation at the stage of the appeal, and that the value of Rs. 15 lakhs which had been mentioned in the plaint as the value of his claim for jurisdictional purposes should be treated as the value also for purposes of Court-fee under section 7 (iv) (*b*) of the Act. The application made by the appellant for a formal amendment of the valuation was rejected and under section 12 (ii) of the Court-fees Act the appellant was directed to pay deficit Court-fee on the basis of Rs. 15 lakhs not only on his memorandum of appeal but also on his plaint. Aggrieved by this order Sathappa Chettiar preferred an appeal to the Supreme Court of India against the order calling upon him to pay the additional Court-fees on Rs. 15 lakhs. The decision of the Supreme Court in the matter is reported in *Sathappa Chettiar* v. *Ramanathan Chettiar*[3]. Their Lordships held that the decision of Satyanarayana Rao and Rajagopalan, JJ.[1], holding that the proper provision of the Court-fees Act applicable was section 7 (iv) (*b*) became final under section 5 of the Act, and that it was no longer open to bring about a variance of that order by any subsequent decision of another Bench. Their Lordships also took the view that the value of Rs. 15 lakhs adopted by the plaintiff in the plaint was one for purposes of jurisdiction, and that the plaintiff could not be compelled to adopt that as the value for purposes of Court-fee. On the footing that section 7 (iv) (*b*) of the Court-fees Act was applicable, Their Lordships held, that the logical result would be to enable the plaintiff to put in his own valuation even if it were to be made by way of a formal amendment of the plaint. Their Lordships observed thus at page 1035:

"In our opinion therefore the learned Judges of the Madras High Court were in error in holding that the valuation for jurisdiction showed in the plaint should be taken to be the valuation for the payment of Court-fees on the plaint as well as the memorandum of appeal. In view of their prior decision that the present case fell under section 7 (iv) (*b*) they should have allowed the appellant to amend his valuation for the payment of Court-fees not only on the memorandum of appeal but also on the plaint.

We must accordingly set aside the order under appeal and direct that the plaintiff should be allowed to state the amount of of Rs. 50,000 at which he values the relief sought by him for the purpose of section 7 (iv) (*b*) of the Act. Shri Krishnaswamy Ayyangar has orally requested us to give him liberty to make the appropriate amendment in his plaint and we have granted his request."

In pursuance of the decision of the Supreme Court the plaintiff amended paragraph 33 of the plaint by inserting the value of Rs. 50,000 for purposes of Court-fee and jurisdiction under section 7 (iv) (*b*) of the Act on 4th January, 1958.

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1. *Sathappa Chettiar, In re*, (1954) 2 M.L.J. 406.
2. *Sathappa Chettiar* v. *Ranganathan Chettiar*, (1955) 2 M.L.J. 408.
3. (1958) S.C.J. 407: (1958) 1 M.L.J. (S.C.) 148: (1958) 1 An.W.R. (S.C.) 148: (1958) S.C.R. 1021.

While the above proceedings in respect of the proper Court-fee payable were pending, the taxing officer who taxed costs due by the plaintiff to the defendant (the suit having been dismissed by Ramswami Gounder, J., with costs) fixed the advocate's fee payable by the plaintiff to the defendant in a sum of Rs. 11,350 which would be the counsel's fee allowable if the value of the claim is taken as Rs. 15 lakhs, and issued an allocator, dated 25th February, 1954. At the time when this was allowed by the taxing officer no objection was taken, as indeed no objection could be taken, as the parties proceeded on the footing that the value of the claim was only Rs. 15 lakhs.

The plaintiff filed Application No. 196 of 1958 on the Original Side of this Court while the appeal against the judgment and decree in C.S. No. 311 of 1951 was still pending praying for reliefs by way of amendments in the decree in C.S. No. 311 of 1951 by substituting the sum of Rs. 2,193-5-4 for the sum of Rs. 11,350 allowed as advocate's fees and for a direction against the defendant to refund to the plaintiff the excess amount recovered by him in respect of the advocate's fee under the decree, namely, the sum of Rs. 9,156-10-8.

This application was resisted by the defendant who took the objection amongst others that the application was not maintainable in law. The application was heard by Ganapatia Pillai, J., who dismissed it holding that no order for restitution could be made as the matter was not covered by the provisions of section 144 of the Code of Civil Procedure.

The plaintiff in C.S. No. 311 of 1951 who was also the applicant in Application No. 196 of 1958 is the appellant before us. He challenges the decision of Ganapatia Pillai, J., and contends that the application filed by him is maintainable, that the amendment prayed for should be allowed and that there is no impediment to direct refund of the excess amount received by the defendant by way of restitution either under section 144 of the Civil Procedure Code or under the general inherent powers of the Court.

Before the appellant can succeed in this appeal, he must establish (i) that the application filed by him before the learned Judge is maintainable in law either under the Original Side Rules or under the provisions of the Civil Procedure Code and (ii) that there are valid grounds for directing amendment of the decree as prayed for by him and (iii) that in consequence of any order for amendment being passed the Court has jurisdiction to direct refund of the excess amount paid either under the specific provisions of section 144 of the Code of Civil Procedure or under the inherent powers of the Court under section 151 of the Code of Civil Procedure.

The affidavit in support of the application before the learned Judge is not very clear or specific as regards the grounds on which the amendment is sought. What is stated is that the basis on which Rs. 11,350 by way of advocate's fee was awarded namely, the plaint valuation of Rs. 15 lakhs having been taken away by an amendment of the plaint substituting Rs. 50,000 for Rs. 15 lakhs in pursuance of the directions of the Supreme Court, the decree for costs should be amended substituting as advocate's fee Rs. 2,193-5-4 which alone will be the proper fee on the valuation of Rs. 50,000 now found in the plaint. Order 17, rule 15 of the Original Side Rules governs the matter and the rule is as follows :—

"After a decree or order has been sealed, any application to rectify an inaccuracy, or clerical, or arithmetical error, shall save as provided in Order 13, rule 7 (c) of these rules, be made to the Judge who passed the decree or order, or in the event of his absence on leave, or retirement, to any other Judge, and he may (in his discretion), after notice to the parties, when the Judge deems it necessary, amend the same so as to bring it into conformity with the judgment, or rectifying such inaccuracy or error. Save as aforesaid no alteration or variation shall be made without a review of judgment and hearing under the provisions of section 114 and Order 47 of the Code of Civil Procedure."

The grounds on which reliefs can be sought under the said provision are "inaccuracy", "clerical or arithmetical error", and "the decree not being in conformity with the judgment." It is not contented on behalf of the applicant (plaintiff) that there is any clerical or arithmetical error or that the decree as drafted is not in conformity with the judgment in the case. The only ground that is left is the ground

of inaccuracy'. It must be mentioned again that the applicant himself has not stated in the affidavit in support of the application that what is sought to be rectified by way of the amendment is any inaccuracy. The corresponding provision under the Civil Procedure Code is that embodied in section 152. That runs as follows :

> "Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.".

The English rule, namely, Order 28, rule 11 of the Rules of the Supreme Court is thus set out in *The Annual Practice*, 1960 :

> "Clerical mistakes in judgment or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal."

Neither section 152 of the Civil Procedure Code nor the English rule, familiarly known as the "Slip Rule", contains the word 'inaccuracy' found in the Original Side Rules. The question for consideration is whether the decree for costs including the advocate's fee of Rs. 11,350 based upon a valuation of Rs. 15 lakhs can be said to be inaccurate by reason of an amendment of the plaint substituting Rs. 50,000 for Rs. 15 lakhs introduced long after costs were taxed on the footing of the valuation of Rs. 15 lakhs. At the time when the costs were taxed by the Taxing Officer everything was in order and the taxation was in accordance with the rules for taxation and indeed no exception was taken to it by the plaintiff himself. It is only by reason of the subsequent amendment of the plaint that it became possible for the plaintiff to urge the ground that the award of the advacate's fee in the sum of Rs. 11,350 is erroneous. Does Order 17, rule 15, enable a party to ask for rectification of what may be described as a supervening inaccuracy is the point to be considered. Can subsequent proceedings be invoked to challenge a correct order by a cdllateral attack by way of an amendment without resorting to any proceeding by way of an appeal or a review of the original order?

The word 'inaccuracy' occurring in Order 17, rule 15, standing by itself is, undoubtedly wide. That word is intended to cover cases not governed by the other words, namely, clerical or arithmetical error occurring therein. It is clear that clerical or arithmetical error means something whch is manifest on the face of the record. If supervening inaccuracy can come within the ambit of the provision such inaccuracy cannot be evident or apparent on the face of the record. If the word 'inaccuracy' is to be understood in the context as being cognate to or of the same genus as clerical or arithmetical error, then it must also be one that manifests itself on the face of the record and cannot be one of a kind which has to be spelt out as a result of other proceedings. In order to decide this question as to the scope of the applicability of the word 'inaccuracy' occurring in the rules, one has to resort to rules of Interpretation of Statutes.

General terms occurring in a Statute may be restricted by specific words with which they are associated, with the result that the general language, will be limited by the specific language which indicates the statute's object and purpose. *Crawford on Statutory Construction* sets out the rule at page 325 under the caption "*Noscitur a Sociis*" thus :

> "In order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning the Court may properly resort to the other words with which the ambiguous word is associated in the statute. Accordingly if several words are connected by a copulative conjunction, a presumption arises that they are of the same class, unless, of course, a contrary intention is indicated."

Maxwell on Interpretation of Statutes sets out the rule thus at page 332 :

> "When two or more words which are susceptible of analogous meaning are coupled together *noscitur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general."

In *Arthur Rankin Blackwood v. Her Majesty the Queen*[1], the Judicial Committee observed thus at page 94 :

1. L.R. (1882) 8 A.C. 82 (94).

"Their Lordships conceive that one of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification."

In *Cox* v. *Hakes*[1], Lord Herschell observed thus :

"It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation."

We are of opinion that the above rule of construction can properly be applied to find out the scope and meaning of the expression, 'inaccuracy' occurring in Order 17, rule 15 of the Original Side Rules. If there is no inaccuracy manifest on the face of the record just like a clerical or arithmetical error the Court has no jurisdiction to act under the said rule and direct amendments.

In the present case the advocate's fee of Rs. 11,350 was taxed as part of the costs awarded in favour of the successful defendant on the valuation of Rs 15 lakhs. The defendant must have naturally paid his counsel at least the sum of Rs. 11,350 in the faith and belief that he would be entitled to recover it as part of his costs from his adversary. His belief was justified and he was awarded the costs and he was also able to collect it from the plaintiff. Any amendment of the decree for costs by substitution of Rs. 2,193-5-4 for Rs. 11,350 will, now enable the plaintiff to get back a sum of Rs. 9,156-10-8 from the defendant who will certainly be hard hit by any such order for refund. It is now settled rule that the discretion which the Court has to direct an amendment should not be exercised when the result of such amendment would affect the rights of third parties or which would be inequitable and unfair to one of the parties.

"Where an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce." (Per Lord Watson in *Hatten* v. *Marris*[2]; *Steward* v. *Rhodes*[3]; *The King* v. *Cork*[4]) Annual Practice, 1960, Edn., page 633.

We are of opinion that the application filed by the plaintiff before the learned Judge on the Original Side of this Court is not maintainable as there are no grounds to sustain it and that even if the application can be held to be maintainable the circumstances are such that the discretion should be exercised not in favour of the amendment but in refusing it.

It was argued before us by Mr. V. Tyagaraja Iyer, learned counsel appearing for the respondent that there is no inaccuracy in the record, calling for an amendment and that even on the basis of the amended valuation found in the plaint, it will be open to the Taxing Officer to fix the advocate's fee in the sum of Rs. 11,350. The learned counsel relied upon the decisions of the Bombay High Court reported in *Bald Meharsai* v. *Maganchand*[5], and *Kasanji Kuverji* v. *Surat Municipality*[6]. V. C. Gopalarathnam, learned counsel appearing for the appellant, submitted that these decisions cannot apply to the facts of the present case, which are governed by the provisions of the Fees Rules which make it clear that the valuation adopted in the plaint alone can be the basis for the Taxing Officer in awarding the advocate's fee to be included in the cost. In view of our decision holding that the application itself is not maintainable, it is unnecessary for us to express any opinion on this matter. It is also unnecessary for us to express any opinion on the question of refund by way of restitution in the event of the amendment being granted.

The appeal fails, on the short ground that the application itself is not maintainable on the admitted facts of the case and is therefore dismissed with costs.

R.M. ——— *Appeal dismissed.*

1. L.R. (1890) 15 A.C. 506 at 529.
2. L.R. (1892) A.C. 560.
3. L.R. (1900) 1 Ch. 394.
4. C. C. (1911) 2 In. R. 206.
5. (1905) I.L.R. 29 Bom. 229.
6. A.I.R. 1928 Bom. 247

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Ramaswamy Raja and another .. *Petitioners**

v.

Ellappa Gounder .. *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), *section* 3 (3) (*a*)—*Revenue Divisional Officer acting under—If could grant an injunction pending proceedings initiated under the Act—Civil Procedure Code (V of* 1908), *Order* 39—*Applicability.*

An injunction, which is a preventive remedy, is granted by Courts under the specific provisions of the Civil Procedure Code. There is no inherent power in any Tribunal to grant an injunction unless the jurisdiction to grant it is expressly conferred by statute and such a power cannot be assumed by implication.

Having regard to the scheme of the Madras Cultivating Tenants' Protection Act, 1955 and the Rules framed thereunder, the Code of Civil Procedure does not wholly apply to the Revenue Courts acting under the Act. The Revenue Courts have jurisdiction to decide certain specific matters in respect of limited classes of cases. Though certain provisions of the Civil Procedure Code are made applicable to the proceedings before a Revenue Court under the Act, there is no provision in the Act enabling the Revenue Courts to grant injunctions. The provisions of Order 39 of the Civil Procedure Code could not apply to cases under the Madras Cultivating Tenants' Protection Act. Hence a Revenue Divisional Officer would have no jurisdiction to grant an injunction restraining a landlord from entering his property. The tenant has always got his remedy in such cases to approach the civil Courts for relief by way of injunction.

Petition under section 6-B of Act XXV of 1955 and section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the Sub-Collector of Chingleput, dated 18th May, 1960 and made in C.T.A. No. 4 of 1960.

R. Sundaravaradan, for Petitioners.

S. Varadarajulu Naidu and *V. Srinivasan*, for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises the question whether a Revenue Divisional Officer exercising the powers granted to him under Madras Act XXV of 1955 would be entitled to grant an order of injunction pending proceedings initiated under section 3 (3) (*a*) of that Act.

The respondent claiming to be a cultivating tenant deposited the rent under section 3 (3) (*a*) of the Act and while proceedings under clause (*b*) of that sub-section were pending applied to the Revenue Divisional Officer for an injunction to restrain the landlord and certain others claiming to be purchasers from him from interfering with his possession. The Officer granted the injunction prayed for and the jurisdiction of the Officer to do so is challenged in the Civil Revision Petition.

An injunction is a remedy which is preventive in its nature, that is a remedy before any injury is sustained, *i.e.*, when there is only a threat of an injury. It is now accepted by the decisions of this Court that except in cases where this Court issues an injunction by virtue of its inherent powers as a Court of Record, the subordinate Courts would have no power to issue orders of injunction beyond what is expressly conferred on them by the Code of Civil Procedure. Section 94 of the Civil Procedure Code states that in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, grant a temporary injunction, and in case of disobedience, commit the person guilty thereof to the civil prison and order that his property be attached and sold. The expression "if it is so prescribed" obviously refers to Order 39, rules 1 and 2 of the Code. Therefore, it will follow that Courts to which the Code of Civil Procedure applies would have powers to grant a temporary injunction in accordance with Order 39, rules 1 and 2, and there would be no scope for implying any inherent power in any one of such Courts. An injunction is a specific relief and the jurisdiction to grant it should be conferred by statute. Now the question in the

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* C.R.P. No. 936 of 1960. 22nd August, 1960.
(31st day of Sravana, 1882, Saka.)

present case is whether the Revenue Court acting under Act XXV of 1955 will have power to grant an injunction. The Code of Civil Procedure does not wholly apply to that Court. It has therefore to be seen whether, on the terms of the provisions contained in Act XXV of 1955, such a power exists in that Court. It is needless to point out that a power to grant an injunction cannot be assumed to exist by any implication of law. The reason is that ordinarily it is the civil Court that will have the jurisdiction to grant an injunction. When a statutory tribunal ousts the jurisdiction of the civil Court in regard to certain matters, it has got to be seen whether the powers of the civil Court in regard to injunction, etc., have been abrogated and those powers have been expressly conferred on the special tribunal. It is therefore necessary to examine the provisions of Madras Act XXV of 1955 to ascertain whether there is such a power.

Section 3 (1) of the Act declares that a cultivating tenant shall not be evicted from his holding or any part thereof except at the instance of the landlord and except in accordance with the provisions of the Act. Sub-section (2) provides the cases which would be exempted from operation of the prohibition contained in section 3 (1). Sub-section (3) (*a*) enables the cultivating tenant to deposit the rent payable in the Revenue Court and clause (*b*) of that sub-section provides for the determination as to the sufficiency or otherwise of the rent deposited. Sub-section (4) provides for the eviction of tenants. Section 4 declares the right of a tenant who had been dispossessed for being restored back to possession. It is unnecessary to refer to sections 4-A and 5. Section 6 bars the jurisdiction of the civil Court in regard to matters which the Revenue Divisional Officer is empowered under the Act to determine. Section 6-A directs that certain suits for possession or injunction instituted by the landlord against a cultivating tenant in the ordinary Courts should be transferred for disposal to the Revenue Divisional Officer. Section 7 confers a power on the State Government to frame rules for carrying out the purposes of the Act. It is clear from the provisions of section 6 that the civil Court will have power to grant an injunction in regard to matters between the landlord and the cultivating tenant except in cases where the Revenue Divisional Officer is exclusively empowered by the Act. The Act itself does not provide for the adjudication of disputes between the landlord and the cultivating tenant in all matters. In other words, it is not a code in regard to disputes between a landlord and a cultivating tenant. It provides only for a limited class of cases, namely, deposit of rent by a tenant, eviction by the landlord of the cultivating tenant and restoration of possession to the tenant in case the landlord unlawfully dispossesses him. There is no provision in the enactment enabling the tenant to be protected in his possession either by expressly granting a power in the Revenue Court to grant an injunction or to punish an erring landlord when he dispossesses a tenant. The only protection granted to the tenant who has been dispossessed is under section 4 of the Act.

Rules have been framed under section 7 of the Act. Rule 8 (ii) as originally framed applied the provisions of the Code of Civil Procedure with regard to (*a*) the issue and service of summons, (*b*) the examination of parties and witnesses and (*c*) to production of documents. In *Appai Goundan* v. *Perichi Gounder*[1] a question arose whether a Revenue Divisional Officer would have jurisdiction under the Act to set aside *ex parte* orders. That question was answered in the negative by Basheer Ahmed Sayeed, J. The learned Judge held that a Revenue Divisional Officer acting under Act XXV of 1955 was not a Court having any inherent jurisdiction and that the rules of the Civil Procedure Code would not in general apply to the proceedings before him *in extenso* and that as such he would have no power to set aside an *ex parte* order passed by him or to stay the execution of the order on the ground that the *ex parte* order was made without jurisdiction. After this decision was rendered the rule-making authority introduced sub-rules (*d*) to (*i*) to rule 8 (ii). They were : (*d*) the amendment of pleadings ; (*e*) the addition of parties ; (*f*) the passing of *ex parte* orders and setting them aside for good cause ; (*g*) the ordering of dismissal for default of appearance and setting aside such orders for good cause ; (*h*) local inspection ; and

1. (1958) 2 M.L.J. 99.

(*i*) the passing of orders. It will be seen that even if a power to grant an injunction could be granted by the rules, there is no provision in rule 8 (ii) even as amended to enable the Revenue Court to grant an injunction. It is very doubtful whether the jurisdiction to grant a specific relief by way of an injunction could at all be the subject-matter of the Rules framed under section 7. But whatever that may be it is sufficient for the present purpose to state that there is no express power either in the Act or in the Rules enabling the Revenue Court to grant an injunction restraining the landlord from interfering with the possession of the tenant.

Mr. S. Varadarajulu Naidu, learned advocate for the respondent, in the course of his able arguments dealt at length with the object and purposes of the Act and contended that as the intention of the Legislature in enacting the legislation was the avowed purpose of protecting the cultivating tenant from eviction, it was necessary as an incident of the exercise of the powers conferred on the Revenue Courts that they themselves should have a power pending disposal of the petition to restrain a landlord who wants to take by force possession from a tenant whose rights were declared by the statute. Learned counsel pointed out that section 3 protects the rights of a cultivating tenant by declaring that he should be allowed to continue in possession and if he were dispossessed section 4 in certain circumstances also enabled him to obtain restoration of possession. It was therefore contended that the Court should have a power to prevent unlawful dispossession. That, according to the learned counsel, is an incidental power which should be implied from the other provisions of the Act. As I stated earlier, the question is not whether the power is necessary for the purpose of effectively adjudicating a dispute between a landlord and tenant or even whether such a power can be implied in the circumstances of the case, but whether it was expressly given by the statute. It is needless to point out that there being no such provision, it cannot be a matter for implication. The tenant has always got his remedy in such cases to approach the civil Court for relief by way of injunction.

Learned counsel next contended that rule 8 (ii), sub-clause (i) would enable the Officer to grant the order of injunction. Rule 8 (ii) enumerates certain classes of cases in which the provisions of the Code of Civil Procedure would apply (*vide* clauses (*a*) to (*h*)). Clause (*i*) is the residuary clause which says " the passing of orders. " In the context " the passing of orders " mentioned in clause (*i*) could only be correlated to the subject-matter dealt with from clauses (*a*) to (*h*) and it cannot imply that the Court will have all the other powers mentioned in the Code of Civil Procedure in regard to a civil Court. To construe in the way in which it is contended would only mean that the enumeration in rule 8 (ii) is unnecessary which will be the case if all the provisions of the Code of Civil Procedure were to apply. I am of opinion that the powers of the Civil Court in regard to granting of injunction not having been taken away and conferred on the Revenue Court in regard to the cases arising under the Act XXV of 1955, the Revenue Court would have no jurisdiction to pass any order granting injunction.

This conclusion can be reached by another line of reasoning as well. In *Appai Goundan* v. *Perichi Gounder*[1], Basheer Ahmed Sayeed, J., held that the provisions of the Code of Civil Procedure would not generally apply to the proceedings before the Revenue Divisional Officer under Act XXV of 1955 except in so far as they have been specifically incorporated into that Act. After the decision was rendered the rule-making authority added clauses (*d*) to (*i*) alone. That shows that the rule-making authority accepted the decision of the learned Judge and provided only for a few of the cases provided in the Code of Civil Procedure. That would imply that in regard to the other matters not provided for in rule 8 (ii), the authority accepted the decision of this Court, namely, that the other provisions of the Code of Civil Procedure would not apply. It would follow that the provisions of Order 39 would not apply to a case under the Cultivating Tenants' Protection Act.

1. (1958) 2 M.L.J. 99.

The result is that the Revenue Divisional Officer would have no jurisdiction to grant an injunction restraining the landlord from entering the property. This Civil Revision Petition is allowed. There will be no order as to costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

S.N.A.S.A. Annamalai Chettiar, Karaikudi .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 4 (1) (b) (iii)—Applicability—Remittance of foreign profits—Receipt of money in the taxable territory—What amounts to—Assessee purchasing motor car and radio outside India out of foreign profits—Subsequent bringing over of the motor car or radio to India—Effect—If remittance of foreign profits.

To constitute a receipt of money in the taxable territories under section 4 (1) (*b*) (iii) of the Income-tax Act, it should be remitted *in specie* or in any form known to the commercial world for the transmission of money from one country to another.

Where the assessee purchased a motor car in Singapore and a radio which was fitted into the car and subsequently brought the car with the radio to India, the cost of the car and the radio purchased out of the foreign profits cannot represent money or money's worth brought over and therefore the cost of the car and the radio purchased out of foreign profits brought into the taxable territory would not constitute remittance of foreign profits within the meaning of section 4 (1) (*b*) (*iii*) of the Income-tax Act.

Gresham Life Assurance Society, Ltd. v. *Bishop*, L.R. (1902) A.C. 287 and *Commissioner of Income-tax* v. *Ahmedabad Advance Mills, Ltd.*, L.R. 67 I.A. 115 : I.L.R. (1940) Bom. 332 : (1940) 8 I.T.R. 95 (P.C.), applied.

That the assessee had the benefit of what he had purchased abroad and brought into India is not a test at all in deciding whether there was a remittance. Nor would the fact that the assessee debited his headquarters account with the cost of the car and the radio affect the position.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. No. 725 of 1955-56 (I.T.A. No. 65 of 1955-56 in assessment year 1952-53) on its file for decision on the following question of law, *viz.*:

"Whether the cost of the car and radio purchased out of foreign profits and brought into the taxable territories can constitute remittance of foreign profits within the meaning of section 4 (1) (*b*) (iii)?"

K. Ramamani for *M. Subbaraya Ayyar, V. Sethuraman, S. Padmanabhan* and *S. V. Subramaniam*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—On 24th September, 1951, the assessee purchased a motor car in Singapore, and on 1st October, 1951, he purchased a radio which was fitted into the car. The total cost computed in terms of Indian curency came to Rs 11,691. Subsequently, in November, 1951, the assessee brought the car with the radio to India. In the assessment year 1952-53 the Department held that the assessee had brought this sum of Rs. 11,691 as a remittance into the taxable territory. The appeal to the Assistant Commissioner failed. The further appeal to the Tribunal also failed, the Tribunal rejecting the assessee's claim with the observation ;

"the cost of car and radio purchased out of foreign profits and brought into India clearly represents money or money's worth brought over."

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* Case Referred No. 28 of 1956. 3rd August, 1960. (12th Sravana, 1882, Saka.)

The question referred to this Court under section 66 (1) of the Income-tax Act was,

> "whether the cost of the car and radio purchased out of foreign profits and brought into the taxable territory can constitute remittance of foreign profits within the meaning of section 4 (1) (*b*) (iii)."

The assessee was resident, and ordinarily resident in the taxable territory for the assessment year in question. It was agreed to by both the parties that how this amount of Rs. 11,691 was treated, that is, whether it was treated as a remittance or not, did not affect the tax liability of the assessee in the year of assessment. None the less the question having been raised as a question of law, it has to be answered.

Both before the Income-tax Officer and before the Assistant Commissioner the assessee relied on the principle laid down by the Privy Council in *Commissioner of Income-tax* v. *Ahmedabad Advance Mills, Ltd.*[1]. But they purported to distinguish the claim of the assessee on the facts. The Tribunal itself made no reference to *Commissioner of Income-tax* v. *Ahmedabad Advance Mills, Ltd.*[1].

What their Lordships of the Privy Council approved of was the principle laid down earlier in *Gresham Life Assurance Society, Ltd.* v. *Bishop*[2], that to constitute a receipt of money it should be remitted *in specie* or in any form known to the commercial world for the transmission of money from one country or place to another. In that case, what the assessee did was to purchase machinery from out of the profits that had accrued abroad and send the machinery for use by the assessee in India. Their Lordships of the Privy Council pointed out that

> "it cannot be suggested in the present case that the mill stores and machinery were purchased in England and shipped out to India as a method of bringing over the sterling interest that had been received in this country. No one in his senses would think of employing such a method of transmitting money."

Their Lordships considered the hypothetical case of a man purchasing a car and clothes in England for £500 and using them there and taking them over to India subseqently after a laspe of say two years. Their Lordships proceeded :

> "If upon his return to India the question were put to him, 'How much have you left of the £500?' his answer would be 'none', and the answer would be a true one whether addressed to a casual enquirer or to the Income-tax Officer. What he has taken back to India are some much worn clothes and a car much depreciated in value. But these things can in no sense be described as income ; and it is only income that can be taxed under the Indian Income-tax Act."

We do not think that there could be any difference to the application of the principle laid down by the Privy Council, if the articles purchased abroad had been used only for two months instead of two years.

If the principle laid down in *Ahmedabad Advance Mills case*[1], is applied to the facts of this case, it would be found that what the assessee did was to spend a part of the profits that had accrued to him and had been received by him abroad fo the purchase of a car which he brought over to India, obviously for his use. It was not suggested that he brought the car with the idea of selling it, and that it was a device resorted to by him for bringing in money or money's worth. That the assessee had the benefit of the car in India in no way affects the question at issue. What was it that he brought to India, was it money or money's worth? Money's worth has to be given the meaning which was accorded to it by Lord Brampton in *Gresham Life Assurance Society, Ltd.* v. *Bishop*[2], was it a case of transmission of money in any form known to the commercial world? As their Lordships of the Privy Council pointed out, mill machinery was certainly not a normal means of transmission of money or money's worth. No more is the purchase of a car abroad which is brought into this country for personal use. The Departmental Oficers took the view, that if any person purchases abroad personal effects and brings them over to India, it would be a case of bringing in money's worth and would constitute a remittance. That is a fallacious line of reasoning. As we said, that the assessee had the benefit of what he had purchased abroad and brought into India is not a test at all in deciding whether there was a

1. I.L.R. (1940) Bom. 332 : L.R. 67 I.A. 115 : 8 I.T.R. 95 (P.C.).
2. L.R. (1902) A.C. 287.

remittance. The claim of the assessee, in our opinion, falls squarely within the scope of the rule laid down in *Ahmedabad Advance Mills case.*[1]

Learned counsel for the Department pointed out that the statement of the case recorded that on 7th November, 1951, the assessee made an entry in his books, showing the value of the car and the radio, 718,.50 dollars, as having been transferred to the " Ooranuppu account " of the assessee, that is, the headquarters account. Learned counsel urged that the assessee himself treated it as money remitted to his credit in the headquarters account. That may not be a correct way of interpreting that entry. There was no question of the liability of the assessee being reduced in any way by the adjustment entry as between the foreign books and the headquarters books. He could not be a debtor to himself. Further, how a particular transaction is recorded in the books of the assessee is not conclusive of the nature of the transaction. What had to be established in this case was that there was a remittance of money or money's worth. What was brought into India was a car. We have rejected the contention that that represented money's worth The fact that the assessee debited his headquarters account with the cost of the car really does not affect the position in answering the question, whether there was a remittance, or rather, whether money's worth was brought into India. That question has still to be answered by the application of the principle laid down in *Ahmedabad Adavance Mills case.*[1]

We have no hesitation in holding that there was no remittance. It was not money or money's worth that the assessee brought into the taxable territory when he brought the car which he had purchased abroad for his use in the taxable territory.

The question is answered in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

P.R.N. ——— *Reference answered in favour of assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

R. Ramnarayan Chellaram, Bangalore .. *Respondent.*

Income-tax Act (XI of 1922), sections 15-A and 17 (1)—Construction—Non-resident assessee—Average rate of tax—Calculation of —Earned income relief—If reducible from total world income.

It is clear from section 15-A of the Income-tax Act that the earned income relief does not enter into the computation of the total world income. Under section 17 (1) neither the computation of the total world income nor the computation of the assessee comes into play. There is no scope for reducing the total world income by the earned income relief for the purpose of ascertaining the world income and hence the earned income relief is not reducible from the total world income of the non-resident assessee for the purpose of calculating the average rate of tax.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R.A. Nos. 539 and 540 of 1955-56 on its file for decision on the following questions of law, *viz.*:

" Whether on a proper construction of section 17 (1) and section 15-A and other relevant provisions of the Income-tax Act, the earned income relief is reducible from the total world income of the non-resident assessee for the purpose of calculating the average rate of tax?"

C. S. Rama Rao Sahib, Special Counsel, for Applicant.

V. Balasubramaniam, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The facts are not in controversy. They lie within a brief compass, and, as they have been set out in the statement of the case, we do not propose to set them out over again.

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1. I.L.R. (1940) Bom. 332: L.R. 67 I.A. 115: 8 I.T.R. 95 (P.C.).

* Case Referred No. 12 of 1956. 25th July, 1960. (3rd Sravana, 1882, Saka)

The contention of learned counsel for the Department, that there is no provision for reducing the total world income by the earned income relief for the purpose of section 17 (1), is well founded, and must prevail. Section 15 (a) makes it clear that the total income has to be reduced by the earned income only for the purpose of income-tax, and that the income so reduced is to be deemed to be the total income. On a reading of section 15 (a) it should be obvious that the earned income relief does not enter into the computation of the total world income. With reference to section 17 (1), neither the computation of the total world income nor the computation of the total income of the assessee comes into play. We take the computed total world income and the computed total income, and the total world income has then to be taken into account only for the purpose of ascertaining the rate applicable to the total income in the case of a non-resident. From what we have said above, it should be clear that there is no scope for reducing the total world income by the earned income relief for the purpose of ascertaining the total world income. The total world income is to be taken into account only for the purpose of ascertaining the rate. Learned counsel for the assessee contended that the use of the expression "had it been his total income" in section 17 (1) should be construed to reduce the total world income by the earned income relief, because the concept of the total world income is the reduced income, as section 15 (a) made it clear. We are unable to accept that contention. Section 17 (1) by itself enacts no legal fiction. The concepts of the total world income and total income, as defined by the statute, are clear. They have to be considered for the purpose specified in section 17 (1), to ascertain the rate applicable to the total income, and the other standard is the total world income. The total world income is the total world income unreduced by any earned income relief. The Tribunal, in our opinion, was in error. Learned counsel for the Department drew our attention to the provisions of section 17 (5). That only strengthens the conclusion we have reached, independent of the provisions of section 17 (5).

The question referred to this Court under section 66 (1) will be answered in the negative and in favour of the Department.

Obviously, it is a question of principle that was fought out by the Department. We find that the difference in tax would be a little less than Rs. 50. We do not think this is a case where any costs ought to be awarded, even though the Department has succeeded.

P.R.N. ——— *Reference answered against assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Alsidass Kaverlal .. *Appellant**

v.

J. Hiriya Gowder .. *Respondent.*

Civil Procedure Code (V of 1908). Order 21, Rule 46, (a) and (c)—Attachment of amounts payable by garnishee to Judgment-debtor—Prohibitory order in respect of an ascertained amount—Effect—Uncorroborated statement of the garnishee as to the state of acconuts—If can guide the Court.

Where the appellant (decree-holder) applied to Court for the issue of an order of attachment of certain amounts due to the respondent (judgment-debtor) from the Garrison Engineer (garnishee) and the Court (having been informed by the garnishee that an amount of Rs. 7,237-75 is due to the judgment-debtor, and the balance if any remained unascertained on that date) confirmed the prohibitory order in respect of Rs. 7,237-75 only without any further enquiry and where the decree-holder filed a fresh application for a fresh attachment of deposit amounts aggregating to a larger sum of money than that mentioned in the order, which was due to the judgment-debtor on the date of attachment,

Held : (1) That the Court would not at all be justified in accepting the uncorroborated statement of the garnishee as to the state of account; on the contrary the Court must make an enquiry and come to its independent conclusion.

* A.A.O. No. 216 of 1959.

20th June, 1960.
(30th Jyaistha, 1882—Saka).

(ii) That where a debt is being attached, it is not necessary that exact amount of the debt should be stated, provided there is a debt actually due at the time of attachment.

(iii) That the prohibitory order issued by the Court will operate to bar the payment to the judgment-debtor by the garnishee of all amounts payable as upto the date of attachment whether Rs. 7,237-75 alone or aggregating to any higher figure. The order will not operate in respect of further earnings by the judgment-debtor beyond that date.

Appeal against the order of the Court of the Subordinate Judge, Nilgiris, Ootacamund, dated 23rd January, 1959 and made in E.A. No. 274 of 1958 in E.P.R. No. 40 of 1958 in O.S. No. 80 of 1945.

M/s. Pais, Lobo and *Alwares*, for Appellant.

T. R. Srinivasa Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the petitioner decree-holder against the order of the learned Subordinate Judge, Ootacamund in an execution application under Order, 21, rule 46, Civil Procedure Code. The facts are simple, and are as follows :

Originally the appellant (decree-holder) prayed to the Court below for the issue of a prohibitory order in respect of certain amounts payable by the Garrison Engineer, Wellington to the respondent (judgment-debtor), apparently relating to certain contracts for the Army executed by the judgment-debtor It is not in dispute before me that this application under Order 21, rule 46, Civil Procedure Code, was perfectly maintainable and in order, and that it related to the sums payable by the Garrison Engineer to the judgment-debtor up to the date of the application. As will be clear from a glance at Order 21, rule 46, Civil Procedure Code, that rule applies to attachment of certain kinds of property not in possession of the judgment-debtor, including a debt not secured by a negotiable instrument (rule 46 (*a*)) and other movable property (rule 46 (*c*)) not in the possession of the judgment-debtor. The present application was clearly under rule 46 (*c*), as it related to cash payable to the judgment-debtor by the Garrison Engineer. I further agree with the contention of the learned counsel for the appellant (Mr. Alwares) that the application would be equally tenable under rule 46 (*a*), as this is a case of a debt due by the Army Authorities to the judgment-debtor not secured by the Negotiable Instruments Act. On 8th April, 1958, the Garrison Engineer wrote a letter to the Subordinate Judge, Ootacamund, in respect of his prohibitory order, informing the Court that an amount of Rs. 7,237-75 had been withheld in response to the order that the balance payable, if any, was so far unascertained, and that the military authorities were therefore unable to state that any further specific balance was payable to the judgment-debtor. There is another letter, dated 16th May, 1958, from the Garrison Engineer, in similar terms, but also intimating the Court that

"all amounts that become due to the contractor are being kept in deposit (in suspense account), and it has been ensured that no payment is made to Sri J. Hiriya Gowder (judgment-debtor)."

Now, what seems to have happened after this is that the Court, without taking evidence and without any further enquiry, merely confirmed the prohibitory order issued, in respect of the sum of Rs. 7,237-75 alone. The decree-holder (appellant) was naturally aggrieved by this, as, in his view, nearly Rs. 20,000 was due to the judgment-debtor on the date of the attachment. He filed a fresh application under Order 21, rule 46, Civil Procedure Code, praying for a fresh attachment of bill amounts, deposit amounts, etc., totalling to nearly Rs. 20,000. This application was resisted by the judgment-debtor on several grounds, such as the ground that the decree was barred by limitation, and the ground that it was satisfied by private payments between the parties. These grounds were negatived on the merits. But the Court below held, upon the point of maintainability, that no such petition could lie for any amount exceeding the amount of Rs. 7,237-75 reported as the ascertained amount by the Garrison Engineer. The Court consequently dismissed the application as not maintainable.

I find it difficult to follow the reasoning upon which the order of the learned Subordinate Judge is based. Even taking it that the first prohibitory order was

enforced up to the extent of Rs. 7,237 odd alone, I find nothing in the processual law to prevent a party situated like the present appellant from applying for a fresh prohibitory order with regard to any balance of monies still payable by the Army Authorities to the judgment-debtor. Again, it is not as if any enquiry or evidence had established that, on the date of the application by the decree-holder, no amount greater than Rs. 7,237 odd was payable to the judgment-debtor. That is merely an uncorroborated statement by the Garrison Engineer, upon which there is no evidence whatever. Needless to say, even the letter could not be accepted as evidence and acted upon, until it had been properly proved. As pointed out in Mulla's Civil Procedure Code, 12th Edition, page 822, even where a debt is being attached, it is not necessary that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of the attachment.

This point is covered by authority. As learned counsel for the appellant points out, Order 45, rule 1 of the Rules of the Supreme Court in the United Kingdom has been framed upon the lines almost identical with our own Order 21, rule 46, Civil Procedure Code. An authority precisely in point, and relating to almost identical circumstances, is *O' Driscoll* v. *Manchester Insurance Committee*[1]. What happened in that case was that a panel doctor had done certain work under agreement with an Insurance Committee which had received funds in respect of the medical benefit from the National Insurance Commissioners. The debt owing to the doctor was actually unascertained, but the Court nevertheless held that an attaching creditor could attach this liability under Order 45, rule 1 of the Supreme Court Rules, notwithstanding the fact that the share payable to the judgment-debtor had not been ascertained at all. Again, it seems to me clear that the Court would not at all be justified in accepting the bare statement of the garnishee that no debt is due. Under those circumstances, on the contrary, the Court must clearly make an enquiry and come to its independent conclusion. For this proposition, reference might be made to *Moideen Batcha* v. *Sulaiman Sahib*[2]; where Krishnaswami Nayudu, J., held that, under the circumstances, the Court may even appoint a Receiver in execution and direct an enquiry, without acting upon the statement of the garnishee.

Consequently, I allow the appeal to the limited extent of holding that the prohibitory order issued by the Court will operate to bar the payment to the judgment-debtor by the Garrison Engineer of all amounts payable as up to that date, whether Rs. 7,237 odd alone, or aggregating to any higher figure. The order will obviously not operate in respect of further earnings, if any, by the contractor, beyond that date. If the decree-holder desires to restrain the garnishee in respect of payment out of such future monies earned, he will have to take separate proceedings. The learned Subordinate Judge was hence not justified in dismissing the application outright, and in holding that the prohibitory order issued was effective only up to the extent of Rs. 7,237 odd and no more. The appeal is thus partly allowed.

The parties will bear their own costs.

K.L.B. *Appeal partly allowed.*

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1. L.R. (1915) 3 K.B. 499. 2. (1955) 2 M.L.J. 522.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

Thulasi .. *Appellant**

v.

Ammayappa Pillai and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938) *and Amending Act (XXIII of* 1948), *section* 16 (ii) *and* (iii)—*Applicability—Decree of original Court before Act—Deposit of amounts directed by decree before Act—Appeal by some parties against part of decree—Appeal decided after Act—Application by party not appealing and not interested in appeal for relief under section* 19 (2) *of main Act—Competency—" Become final "—" Satisfied in full "—Meaning of—Civil Procedure Code, (V of* 1908), *Order* 41, *rule* 11—*Applicability and scope.*

Where the decree of the original Court, so far as the applicant for relief under the Madras Agriculturists Relief Act is concerned, has become final long before the commencement of the Amendment Act XXIII of 1948, but an appeal is filed against a part of the decree by persons other than the applicant and in respect of matters other than that in which the applicant is interested, and a decree is passed in such appeal after the commencement of the Amending Act of 1948, section 16 (ii) of the Amendment Act, 1948, cannot be availed of by the applicant. It cannot be said that once an appeal has been preferred even against a part of the decree, the whole matter is *res integra* for the purpose of claiming relief under Madras Act IV of 1938 as amended by Act XXIII of 1948, for the benefit of even a party not appealing and not interested in the appeal preferred from the decree of the original Court.

Krishnama Chettiar v. *Mangammal*, I.L.R. 26 Mad. 91 and *Sivaramachari* v. *Anjaneya Chetty*, (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277, distinguished.

Nor would Order 41, rule 4, Civil Procedure Code, apply, so as to enable the applicant to claim relief under the Madras Agriculturists Relief Act, because the rule can have no application when the appeal is only by some of the parties and against a part of the decree.

When the decree sought to be scaled down has been satisfied by deposit into Court of the amount directed by the decree to be paid by plaintiff, and all that remains is only a direction to the defendant to deliver possession of the concerned properties to the plaintiff, section 16 (iii) can have no application. *Dhuttaloor Subbayya* v. *Paidigantan Subbayya*, (1905) 17 M.L.J. 119 : I.L.R. 30 Mad. 470 (F.B.), distinguished.

The decree for possession cannot be scaled down ; the mere fact that the amount deposited in accordance with the decree has not been withdrawn from Court by the defendant would not make any difference, because the decree has been satisfied to the extent possible and there is nothing for section 16 (iii) of the Amending Act to operate.

When section 16 of the Amending Act of 1948 does not apply, section 19 (2) of the Act, as amended, cannot also apply. Section 16 by itself does not confer any right to take proceedings for scaling down.

Appeals under clause 15 of the Letters Patent against the Judgment and Order of the Hon'ble Mr. Justice Basheer Ahmed Sayeed, dated 6th July, 1954 and made in A.A.O. Nos. 355 and 356 of 1956 respectively preferred to the High Court against the orders of the Court of the Subordinate Judge, Thanjavur, dated 10th December, 1951 and made in O.P. No. 87 of 1949 and I.A. No. 394 of 1949 in O.S. No. 1 of 1944 respectively.

M. Ramachandran, G. Ramaswamy and *S. M. Subrahmanyam*, for Appellant.

R. Ramamurty, P. S. Raghavarama Sastri and *K. P. Narayanaswami Ayyangar*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals are from the judgment of Basheer Ahmed Sayeed, J., disposing of two connected Civil Miscellaneous Appeals Nos. 355 and 356 of 1952. It is sufficient to mention the following facts for disposal of these two appeals.

The first respondent, claiming to be the reversioner to the estate of one Subbanna Pillai, filed a suit O.S. No. 1 of 1944 in the Court of the Subordinate Judge of Thanjavur, for recovery of possession of several items of properties from several alienees who were in possession of particular properties on the ground that the alienations were not

* L.P.A. Nos. 192 and 193 of 1957. 5th May, 1960.
(15th day of Vaisaka, 1882,—Saka).

binding on him. The appellant before us was an alienee of two sets of properties under two usufructuary mortgages for Rs. 5,000 and Rs. 3,000 respectively. The alienee, *inter alia* pleaded that the first respondent was not the reversioner. They also contended that the respective alienations in their favour were binding on him.

The learned Subordinate Judge of Thanjavur in his judgment dated 6th April, 1945, held that the first respondent was the reversioner and that certain of the alienations were not binding on him but that the other alienations, including the two mortgages in favour of the appellant, were binding on him. The decree in so far as it concerns the present appellant runs as follows :

"(i) On payment into Court onor before 6th July, 1945, of the sum of Rs. 5,000 to the credit of the defendants 7 to 15. . . . . . the defendants 7 to 15 do deliver possession to the plaintiff of the plaint B Schedule items 26 to 30 described hereunder, that in default of punctual payment as aforesaid the suit in respect of the suit items do stand dismissed ;

(ii) on payment into Court by the plaintiff on or before 6th July, 1945, the sum of Rs. 3,000 to the credit of defendants 7 to 15. . . . . . defendants 7 to 15 do deliver possession to the plaintiff of the plaint B Schedule items 17 to 19, and 23 to 25; that in default of punctual payment as aforesaid the suit in respect of the said items do stand dismissed."

Neither the plaintiff nor any of the defendants 7 to 15 appealed against the decree so far as it concerned items above-mentioned. Some of the other alienees, however, defendants 1, 2 and 4, filed an appeal to this Court, Appeal No. 540 of 1945 against that portion of the decree which related to the items in their possession, namely items 13 to 15 of Schedule B. Their grounds of appeal included a ground that the plaintiff was not the reversioner.

While the appeal was pending the plaintiff deposited into Court a total sum of Rs. 8,000, *i.e.*, the aggregate of the two sums of Rs. 5,000 and Rs. 3,000 which he had been directed to deposit into Court on 27th June, 1945. It appears that on 9th September, 1945, delivery was taken of at least some of the properties. It must, however, be mentioned that the respondent did not file any execution petition for delivery of possession of such of the items which, according to him, had not been delivered in pursuance of the decree. Appeal No. 540 of 1945 was disposed of by this Court on the 24th of February, 1949 ; the decree of the Court below was confirmed.

Meanwhile, on the 25th of January, 1949, the Madras Agriculturists Relief (Amendment) Act (XXIII of 1948) came into force. That Act introduced several amendments and, in particular added section 9-A which specifically related to usufructuary mortgages. One of the other amendments made by this Act of 1948 is the addition of sub-section (2) to section 19 of the main Act.

The plaintiff sought to obtain the benefit of the amendments made by the Act of 1948 by filing two petitions, one, an Interlocutory Application No. 394 of 1949, in O.S. No. 1 of 1944, and another, O.P. No. 87 of 1949. The relief prayed for was substantially the same. In the Interlocutory Application the prayer was that the decree may be scaled down and he may be permitted to withdraw the excess amount deposited by him. In the O.P., the prayer was that the Court may be pleased to direct the redemption of the two Othis by scaling down the debt due under them and to declare the correct amount due, and to direct the refund to the petitioner of the excess amount in deposit in O.S. No. 1 of 1944. Both the applications were heard and disposed of together by the learned Subordinate Judge, of Thanjavur. He held that the respondent was not entitled to any relief under Act XXIII of 1948.

Pending the two petitions for relief under Act XXIII of 1948 the respondent made another application for the appointment of a Commissioner to find out what properties were delivered to him in execution and whether any other items covered by the Othi deeds were still undelivered to him. The learned Judge did not grant this prayer of the respondent because, according to him, the moment the money was paid and accepted by the mortgagee, the Othis became discharged, whatever other rights the parties may have about other disputes between them ; and that the allegation that some properties are yet to be delivered could not be true because from 1945 the respondent did not complain that he had to get any more properties

from the other respondents. It was only after Act XXIII of 1948 was passed that he made this allegation.

The above two Civil Miscellaneous Appeals were filed in this Court by the respondent, against the order of the learned Subordinate Judge disposing of the two applications as above. Basheer Ahmed Sayeed, J., allowed both the appeals, set aside the order of the learned Subordinate Judge and remanded the matter to the Court below for scaling down the decree.

It is impossible to support the decision of the learned Judge on any of the grounds contained in his judgment. The first contention on behalf of the respondent which found favour with the learned Judge was that section 16, clause (ii) of the Madras Agriculturists Relief (Amendment) Act (XXIII of 1948) applied to this case because the decree which had been passed in O.S. No. 1 of 1944 had not become final before the commencement of that Act. We have already mentioned that Appeal No. 540 of 1945 was disposed of on the 24th of February, 1949, *i.e.*, after the Amending Act came into force. With respect to the learned Judge, he does not appear to have given due consideration to the fact that the decree in O.S. No. 1 of 1944, so far as it was between the plaintiff and defendants 7 to 15, had become final on 6th April, 1945. The appeal to this Court was not in respect of that part of the decree. Three of the defendants filed that appeal but they did not file the appeal against the entire decree. The decisions cited by the learned Judge in support of his view namely *Krishnama Chettiar* v. *Mangammal*[1], and *Sivaramachari* v. *Anjaneya Chetty*[2] have nothing whatever to do with the facts of this case. We cannot accept the proposition that once an appeal has been preferred even against a part of the decree, the whole matter is *res integra*.

Mr. Ramamurthi Aiyar, the learned counsel for the respondent, was unable to support the learned Judge's statement that whether the plaintiff was the appellant or whether he cared to appeal or did not care to appeal against any part of the decree against him does not have any serious consequence in so far as the appeal had been preferred by one of the parties, nor the other statement by the learned Judge that even when there was an appeal in respect of a part of a decree the whole decree is the subject-matter of the appeal.

Mr. Ramamurthi Aiyar however raised another contention to bring the case within section 16, clause (ii) of the Madras Agriculturists Relief (Amendment) Act of 1948. He referred us to the provisions of Order 41, rule 4 of the Code of Civil Procedure and referred us to the decision of the Full Bench of this Court in *Dhuttaloor Subbayya* v. *Paidigantan Subbayya*[3]. Rule 4 of Order 41, Civil Procedure Code runs thus:

> "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

The obvious flaw in the argument is that in the present case the defendants who filed the appeal in this Court did not appeal from the *whole* decree; they appealed only against a part of the decree which was against them. Order 41, rule 4 of the Code cannot, therefore, have any application. We find in the Full Bench case in *Dhuttaloor Subbayya* v. *Paidigantan Subbayya*[3], that one of the defendants had filed the appeal against the whole decree. Mr. Ramamurthi Aiyar was not able to cite any other authority in support of his contention that Order 41, rule 4 of the Code would apply even when the appeal is only by some of the defendants and against part of the decree. We, therefore, hold that section 16, clause (ii) of the Amendment Act of 1948 cannot be availed of by the respondent.

Then there remains clause (iii) which runs thus:

> "all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act."

1. I.L.R. 26 Mad. 91.
2. (1951) 2 M.L.J. 245: I.L.R. (1952) Mad.
3. (1905) 17 M.L.J. 119 : I.L.R. 30 Mad. 470 (F.B.).

The learned Judge was prepared to hold that this clause applied to the case on more that one ground. With due deference to the learned Judge the first ground is hardly intelligible. The learned Judge says :

> "If they (sic) choose to pay they would get the properties, but if they do not pay within the specified time the properties will remain in the possession of the othidars. Therefore, it cannot be said that that decree was an executable decree and the mere payment of these two sums could not also be said to have had the effect of a discharge of the decree in full or satisfaction as contemplated by section 16 (ii) of Act XXIII of 1948".

This ground, however, was not pressed upon us by Mr. Ramamurthi Aiyar, and need not detain us.

The second ground is that there is a controversy as to whether all the properties covered by the two concerned Othis have been delivered over to the respondent. The learned Judge refers to the application made by the respondent for the purpose of appointing a commissioner to investigate into the matter and to ascertain whether all the items had been delivered or not. The learned Judge has criticised the learned Subordinate Judge's refusal to direct such an enquiry. The learned Judge says :

> "It was the duty of the learned Subordinate Judge to have gone into the question when once an allegation is made on solemn oath that the appellant had not taken possession of the entire properties."

The learned Judge apparently overlooked the fact that the deposit was in June, 1945 and there was delivery of at least some of the properties in September, 1945. But the respondent had at no time brought to the notice of the Court by filing an execution petition that all the properties had not been delivered to him. The learned Judge also failed to notice that this controversy was raised by the respondent only for the purpose of bringing the case if possible within clause (iii) of section 16 of the Madras Agriculturists Relief (Amendment) Act, 1948. In our opinion the learned Judge was not right in observing that the learned Subordinate Judge had not done his duty by appointing a Commissioner and directing an enquiry. In our view this controversy about the failure to deliver some of the properties which itself, we have no doubt, was an afterthought, has nothing whatever to do with the application of clause (iii) of section 16 of the Amendment Act of 1948. The only decree for payment of money was the decree directing the respondent to pay a total sum of Rs. 8,000 towards the two Othis, if he desired to obtain possession of the properties covered by the two Othis. That was the only obligation cast in terms of money on the respondent. That obligation was completely discharged by the respondent depositing a sum of Rs. 8,000 into Court. The decree to that extent had been satisfied and the only thing that remained of the decree was the direction to the defendant to deliver possession of the concerned properties to the plaintiff. Obviously the decree for possession cannot be scaled down. If certain properties had not been delivered in accordance with the decree, the respondent was perfectly at liberty to take proceedings in execution and obtain delivery of the undelivered properties through Court. As the correct position is this, namely, that the decree for payment of money has been satisfied, or, in other words, the debts due under the two Othis have been discharged by payment there was nothing for clause (iii) of section 16 of the Amendment Act (XXIII of 1948) to operate.

It was faintly argued that the fact that this amount of Rs. 8,000 was not actually drawn by the concerned defendants would make a difference. It would not. Once the respondent had made the payment into Court his liability ceased. The decree has been satisfied. Whether the money was or was not drawn out from Court would not affect the respondent.

Mr. Ramamurthi Aiyar, learned counsel for the respondent, finally contended that even though section 16 of the Act XXIII of 1948 cannot apply, section 19 (2) which was inserted in the main Act by the Amendment Act would apply. There is an obvious fallacy in the argument. Section 16 only says that the amendments made by the Act shall apply to certain suits and proceedings, but, actually, section 16 does not confer by itself any right, to take proceedings to scale down the decree or other debt. So even if we are to hold that any of the three clauses of section

16 were to be applicable the application for scaling down must be made under one or other of the substantial provisions of the Act. There can be no application for scaling down under section 16 of the Amendment Act. Which particular section would be applicable would depend upon the facts of each case. In certain cases it may be section 19 or 19(2) or any other amended provision that would apply and in certain other cases even the provisions of the main Act would apply. It cannot be contended that if section 16 of the Amendment Act would not apply to the case, section 19 (2) which was inserted by the Amendment Act would apply.

In the result these appeals are allowed and the order of Basheer Ahmed Sayeed, J., is set aside and the order of the learned Subordinate Judge restored with costs throughout, advocate's fee in one appeal.

P.R.N. —— *Appeal allowed ;Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Muthu Goundar and another .. *Appellants**

v.

Perumayammal .. *Respondent.*

Stamp Act (II of 1899), sections 2 (22) and 35—Definition of promissory note—Scope—Suit documents stipulating payment on demand after a period of two years—If promissory notes and hence inadmissible in evidence by virtue of section 35.

A promissory note may be payable on demand or at a fixed determinable point of time. But in every case there should be an *unconditional* undertaking to pay the money.

The expression " on demand " in a promissory note has a technical meaning, *viz.*, payable immediately or forthwith. It cannot be said that the words " on demand " contained in the suit promissory notes have the technical meaning of being payable immediately as they are conditional upon not being payable for a period of two years. Therefore (in the instant case) the suit documents are not promissory notes and they could be received in evidence on being validated after payment of the proper stamp duty.

Alamelu v. *Rangai Gounder*, (1944) 2 M.L.J. 180, distinguished.

Appeal against the decrees of the District Court, Salem, in A.S. Nos. 187 and 201 of 1957 preferred against the decrees of the Court of the District Munsif of Sankaridrug at Salem, in O.S. Nos. 1142 and 1213 of 1955.

N. R. Raghavachariar, for Appellant in S. A. No. 842 of 1958.

C. S. Rama Rao Sahib, for Appellant in S. A. No. 970 of 1958.

T. M. Chinniah Pillai, for Respondent in both.

The Court delivered the following

JUDGMENT.—These appeals involve the decision of a common and only question, *viz.*, whether the documents on which the respective suits are laid is inadmissible by reason of the provisions of section 35 of the Stamp Act. The trial Court gave the answer in the affirmative and dismissed the suits while the appellate Court came to the opposite conclusion and decreed them.

The operative terms of the documents in the two appeals are identical and they are to the following effect :

" The on demand executed on 21st August, 1950...I promise to pay you or your order after a period of two years on demand by you the principal together with interest the sum of Rs. . . . ."

The documents are stamped with four anna revenue stamps. It is not disputed that if the documents were held to be promissory notes within the definition contained in section 2, sub-clause (22), of the Stamp Act, they must be held to be insufficiently stamped, they being payable otherwise than on demand, the proper duty would be governed by Article 49 (*b*) of the Act, that is, duty as on a bill of exchange for the amounts covered by them. The question is whether the suit documents could be said to be promissory notes.

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* S.A. Nos. 842 and 970 of 1958. 5th September, 1960.
(14th day of Bhadra, 1882—Saka).

Under section 2 (22) of the Stamp Act, a promissory note is one that would come within the definition contained in section 4 of the Negotiable Instruments Act and would include a note promissing payment of any sum of money out of any particular fund which may or may not be available or upon any condition or contingency which may or may not be performed or happen. A promissory note may be payable on demand or at a fixed determinable point of time. But in every case there should be an unconditional undertaking to pay a certain sum of money to or to the order of a certain person or bearer.

The suit documents are not on their terms ones which stipulate payment on demand simpliciter. Nor are they ones which are payable at the end of a fixed period. They are a combination of both, that is, payment is to be made after two years on a demand being made. Further, if the documents are to be construed strictly, it would mean that even if there has been an order to pay them to another person there should be a demand by the original payer.

The expression "on demand" in a promissory note has a technical meaning, *viz.*, payable immediately or forthwith. In such cases, no actual demand is necessary to make the money due under the promissory note exigible. Similarly, if the amount of the promissory note is made payable at the end of a fixed period, it will still be a promissory note as the date of payment is certain and thereafter the liability would be unconditional. No further demand would be necessary to make the amount due. Now, in the present case, the unconditional promise to pay, which would otherwise exist if the promissor had merely agreed to pay on demand, is qualified and made into a conditional one by making it payable after a period of two years; or conversely the unconditional promise which would exist even if the money is made payable at the end of two years is made conditional by the stipulation for a demand thereafter. It cannot be said that the words "on demand" contained in the suit promissory notes have the technical meaning of being payable immediately, as they are conditional upon not being payable for a period of two years. Further, the demand contemplated is one to be made after a period of two years. The making of a demand in such a case would be a condition precedent to the payment and, therefore, there would be no unconditional promise to pay in the documents. It will follow that the suit documents will not be promissory notes within the meaning of the expressions in section 2 (22) of the Stamp Act.

Reliance however is placed upon the decision in *Alamelu* v. *Rangai Gounder*[1]. That was a case where it was agreed that the amount would be paid in two years. There was no stipulation for a demand after that period. It was held that the document in that case was a promissory note though not payable on demand. In the present case, the documents make it clear that the amounts due were not payable within the period of two years, and further there should be a demand after such a period. In the circumstances, it cannot be held that the expression "on demand" contained in the documents was to mean "forthwith" or "immediately". The documents therefore contain stipulations more than what should ordinarily be in a promissory note. I am, therefore, of opinion that the learned District Judge was right in his view that the suit documents are not promissory notes and that they could be received in evidence on being validated after payment of the proper stamp duty (which had been done). The appeals fail and are dismissed with costs. Leave refused.

K.L.B. —— *Appeals dismissed.*

1. (1944) 2 M.L.J. 180 : A.I.R. 1945 Mad. 42.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Haji Gulam Ahmed Mustafa Saheb .. *Appellant**

v.

K. T. A. Basheer Ahmed Dawood and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 41—Applicability—Conditions—Purchaser without inquiry from some Mahomedan cosharers of vague claim to possessory title—If protected—Duty to make inquiry—Silence—Effect of—"Ostensible owner"—Mortgagor—If ostensible owner.

Section 41 of the Transfer of Property Act is a statutory embodiment of a law of estoppel. If, either by words or conduct, a man permits another to hold himself out to be owner of an estate, and a third person purchases it for value from the ostensible owner after reasonable inquiry into title, then the real owner will be estopped from recovering upon the secret title. In order that the section may apply, the transfer must be for valuable consideration and the transferee should have acted in good faith. The section further requires that (1) the transferor should be the ostensible owner ; (2) he should be so by the consent, express or implied, of the real owner and, (3) the transferee should have taken reasonable care to ascertain that the transferor had power to transfer.

Cairncrose v. *Lorimer*, (1860) 3 Macq. 827 ; *Ramcoomar* v. *Mcqueen*, (1873) 11 B.L.R. 46, followed.

A person who purchases from some Mahomedan cosharers, accepting without further examination, some vague claim to possessory title, when the rightful owner neither expressly permitted such ostensible title to be flaunted, nor impliedly consented to it, cannot invoke section 41 and claim the protection of the Court in enforcing his insubstantial title as against the true owner. The mere possession of one co-owner cannot amount to the flaunting of an ostensible title against another, particularly among Muslims, where ownership or co-ownership in shares is the usual incident of inheritance.

Silence will not work an estoppel unless it is such as to induce a belief that the party keeping silent has no right.

Joy Chandra v. *Srinath Chatterjee*, (1904) I.L.R. 32 Cal. 357, relied on.

The fact that the vendor or the person from whom the vendor claimed title executed a mortgage in respect of the property would be of no consequence ; a mortgagor is only dealing with a limited interest and is not an "ostensible owner".

Narayan v. *Purushottam*, (1931) 27 Nag. L.R. 144, relied on.

Appeal under clause 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice Basheer Ahmed Sayeed, in C.C.C.A. No. 135 of 1952 preferred against the decree of the City Civil Court, Madras, in O.S. No. 1592 of 1950.

T. T. Srinivasan and *A. N. Rangaswami*, for Appellant.

G. R. Jagadisan, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is a Letters Patent Appeal by the first respondent in C.C.C. Appeal No. 135 of 1952 before Basheer Ahmed Sayeed, J., which was itself an appeal by the plaintiff in O.S. No. 1592 of 1950 on the file of the Third Additional Judge, City Civil Court, Madras. In that judgment and decree the trial Court had held that the first defendant (appellant here) was a *bona fide* transferee for value from the ostensible owner, with reference to the western 2/3rds portion of house No. 39, Khana Bag Street, Triplicane, which was the subject-matter of litigation, upon the principle of section 41 of the Transfer of Property Act. In the appeal by the plaintiff, the learned Judge (Basheer Ahmed Sayeed, J.), went into the facts of evidence at length, and came to the conclusion that :

"the judgment and decree of the learned City Civil Judge holding that the 1st defendant is a *bona fide* purchaser for valuable consideration in good faith, cannot be upheld and must be set aside."

The first defendant—first respondent is the appellant now before us.

Though the suit and the appeal before the learned Judge seemingly traversed a wider area of fact than the point in issue which we have indicated above, actually that is the only matter now in controversy. For instance, it was originally contended

* L.P.A. No. 35 of 1956. 4th November, 1959. (13th Kartika, 1881, Saka).

that Pyari Begum, the predecessor-in-title of the appellant, was a minor on the date of the preliminary decree in O.S. No. 640 of 1920 on the file of the District Munsif's Court, Tanjore, and that, as she was not properly represented, that decree was a nullity. It was contended that plaintiff had not proved possession within 12 years of this suit, and that the suit was barred by limitation. Upon the facts of the record, which we shall presently state, it can be shown that this argument has no force. It was contended that the suit ought not to have been decreed for the entire two-thirds share held by the late Abdul Khuddus Sahib, as the other heirs (brothers and sisters of plaintiff) having specific shares in the property, did not choose to file an appeal against the dismissal of the suit by the learned City Civil Judge.

These incidental contentions do not now concern us, in the form in which the appeal was pressed and argued. The main question is whether the first defendant (here appellant) is a *bona fide* transferee for value from an ostensible owner, protected in respect of his rights acquired by sale by virtue of the principle of section 41 of the Transfer of Property Act. We must, of course, also see whether the suit is in time, and whether there has been ouster or loss through adverse possession in respect of plaintiff's title, either in favour of the supposed owner and vendor to 1st defendant-appellant, or of any one claiming through or under her. But this is the crux of the controversy in the appeal.

The facts of plaintiff's title are quite clear and largely indisputable. The plaintiff is the son of one K. T. M. Abdul Khuddus Sahib, whose widow is the 3rd defendant, and whose other children are defendants 4 to 9. This man filed the suit O.S. No. 640 of 1920, District Munsif's Court, Tanjore, against Pyari Begum and two others for partition and separate possession of his two-thirds share in the Triplicane house (the subject-matter of litigation) and certain other properties. It is very important to note that this Pyari Begum, the vendor of 1st defendant (appellant) under the sale-deed Exhibit B-10, and another Zainub Bi who is said to have executed the release deed Exhibit B-5 in favour of Pyari Begum by virtue of which Pyari Begum claimed the title to sell, were both parties to the said suit, and that, admittedly, they did not contest it. A final decree was passed in this suit in favour of Khuddus Sahib on 29th November, 1922. (Exhibit A-4). The decree was trasmitted to the City Civil Court, Madras, for execution. In E.A. No. 706 of 1933 on the file of the City Civil Court, Madras, the suit property was actually divided by metes and bounds, and possession of the two-thirds share was delivered over to the said K.T.M. Abdul Khuddus Sahib. The relevant documents, commencing with the judgment in O.S. No. 640 of 1920, District Munsif's Court, Tanjore, are Exhibits A-1, A-2, A-3, A-6 and A-7. From A-7 it is clear that possession was delivered on 5th January, 1934.

This title and the subsequent proceedings culminating in the delivery cannot be refuted upon any grounds, and no such attempt was made before us. Pyari Begum seems to have faintly alleged that the Court delivery proceedings were gone through only in order to protect the property from her maternal uncle with whom she was living, but this was not substantiated. Certainly she and her predecessor Zainub Bi, were bound by the judgment and decree, and the delivery proceedings in pursuance thereof. The result is that Khuddus Sahib became the rightful owner of the present two-thirds share, and obtained possession through Court on the relevant date 5th January, 1934. Equally, the consequence of this delivery is that it terminated any adverse possession or ouster, assuming that time was running against Khuddus Sahib upon such possession by Zainub Bi, or Pyari Begum or anyone else, at that time.

Not merely this. One Swaminatha Sastri, admittedly a tenant of this property executed a registered lease deed in respect of the property, in favour of Abdul Khuddus Sahib, the decree-holder. This is the registered deed (Exhibit A-8) dated 25th February, 1935; undeniably, as a registered instrument, it is constructive notice. Abdul Khuddus died in 1935. The suit was filed on 5th February, 1947, by the descendants of Khuddus Sahib, and was in time. The learned City Civil Judge who ultimately proceeded to dismiss the suit upon other grounds, himself

observed that the suit was in time, and not barred by limitation (conclusion of paragraph 10).

The requirements of section 41 have been expounded and reiterated in so many decisions, that we can see little profit in further traversing such well-beaten tracks of the case law. One of these requirements, that the transfer was for valuable consideration and that the transferee acted in good faith to this extent at least, we shall assume in our analysis of the facts. The other requirements are (1) that the transferor is the ostensible owner ; (2) that he is so by the consent, express or implied, of the real owner and (3) that the transferee took reasonable care to ascertain that the transferor had power to transfer. (*See* Mulla's " The Transfer of Property Act," 4th Edition, 1956, page 185). We shall also assume, in favour of the appellant, that, after the death of Khuddus Sahib, his descendants did not come near the property or exercise acts of ownership, perhaps owing to their residence and interest in the muffasal, till the plaintiff filed this suit within 12 years.

Even so, how can the other tests be considered as even *prima facie* applicable to the facts in the present case ? The true rule of section 41 is that it is a statutory embodiment of a law of estoppel, the principle of which was laid down by the House of Lords in the well known case of *Cairucrose* v. *Zarimer*[1]. See also the observations of the Judicial Committee in *Ramcoomar* v. *Mcqueen*[2]. If either by words or conduct, a man permits another to hold himself out to be the owner of the estate, and a third person purchases it for value from the ostensible owner after reasonable enquiry into title, then the real owner will be estopped from recovering upon the secret title. That is the principle ; surely not that a person like the 1st defendant (appellant) who purchased from the co-owners, accepting without further examination some vague claim to possessory title, and when the rightful owner of this interest (Khuddus) neither expressly permitted such ostensible title to be flaunted, nor impliedly consented to it, can claim the protection of the Court to enforce his insubstantial title as against the true owner. In fact, it is impossible to see how the mere possession of one co-owner, can amount to the flaunting of an ostensible title against another. Again, surely the appellant must have been aware that the property belonged to Muslims, where co-ownership or ownership in shares is the usual incident of inheritance. The appellant should have enquired about the existence of other sharers, and the slightest enquiry in this direction would have led him to the facts of O.S. No. 640 of 1920, and the rightful title of Khuddus to this two-thirds of the property.

We set forth below, *seriatim*, the several pieces of evidence relied on by the appellant for invoking the aid of the principle of section 41 of the Transfer of Property Act. They also indicate that the vendors themselves never advanced more than a most clouded and imperfect title : that in fact, they were studiedly vague. Any man of the most ordinary prudence would have been put on guard by this. The facts also show that the appellant failed to obtain an Encumbrance Certificate for the preceding 12 years, when he would immediately have come to know of the registered lease deed executed by Swaminatha Sastry in favour of Khuddus in 1935. He obtained an Encumbrance Certificate (Exhibit B-11) only between certain years, which totally missed this. As we assume that appellant paid full value, the chartiable construction is that some broker, or similar person, who had knowledge of the lease deed, deceived him.

(*a*) Rental agreement, Exhibit B-1, dated 31st July, 1922 : This proves nothing except that the co-owner Zainub Bi obtained a lease of both house and site, from a tenant of Narasimhalu Naidu.

(*b*) Exhibit B-2, dated 8th August, 1927. Similar lease deed by Swaminatha Sastrigal.

(*c*) Exhibits B-3 and B-4. Mortgages by Zainub Bi in 1931. Nothing except a vague possessory title appears, which possession itself is hardly unusual in a

1. (1860) 3 Macq. 827, 829.
2. (1873) 11 B.L.R. 46.

co-owner. A mortgagor is only dealing with a limited interest, and is not the 'ostensible owner' (*Narayan* v. *Purushottam*)[1].

(*d*) Exhibit B-5 deed of release by Zainub Bi in favour of Pyari Begum, dated 1st March, 1933; again, studiedly vague about the source of title.

(*e*) Since the site itself belonged to one M. Venkataramanujulu Naidu, the site and superstructure having different histories of title, this gentleman filed O.S. No. 820 of 1940, City Civil Court (Exhibit B-18), a claim for recovery of property under the City Tenants' Protection Act. In this, there was a compromise decree by which Pyari Begum (1st defendant) agreed to purchase the land for a specified sum. The sale deed Exhibit B-7, dated 7th January, 1946, is the consequence. It is difficult to see how this action of the owner of the site, affects the right of Khuddus or his descendants, or makes Pyari Begum into an 'ostensible owner'.

(*f*) Other circumstances, such as payments of taxes, corporation register entries, collection of rents, attornment by Swaminatha Sastry to Pyari Begum under the lease, Exhibit B-6, etc. These prove, at the worst for Khuddus and his heirs, that they permitted the co-owners of the original one-third share to enjoy their interest also, while they were busy with pre-occupations of residence in a District and interests there. At worst, this can only constitute the running of an adverse possession. "But silence will not work an estoppel, unless it is such as to induce a belief that the party keeping silence has no right." (Mulla *Op-Cit.*) page 188, on the authority of *Joy Chandra* v. *Srinath Chatterjee*[2]. Also in interpreting this evidence, the fact that the husband of Pyari Begum was the power-of-attorney agent of plaintiff himself, cannot be lost sight of, whether he was so only with respect to the Bangalore properties, or also in respect of Madras properties.

In brief, this was not a case to which the principle of section 41, Transfer of Property Act, could apply. Even if the appellant paid the value, he made no reasonable enquiry into title. The title exhibited in the so-called documents of title is so suspiciously indefinite and vague, that elementary prudence would have dictated further enquiry. Even a perfunctory enquiry would have unearthed the 'true ownership' of Khuddus and his descendants. There was no 'ostensible ownership' in the vendors, no 'express or implied consent' of the true owner. The appeal is quite devoid of merits, upon all these aspects.

With the necessary clarification that the site itself has now been excluded from the scope of the controversy, as the owner sold this to Pyari Begum who admittedly, sold it to appellant, the appeal is dismissed with costs.

P.R.N. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The South Arcot Co-operative Motor Transport Society, Ltd (for ex-Servicemen) Devanampattinam, Cuddalore, N. T. by its Secretary at Devanampattinam .. *Petitioner**

v.

Syed Batcha and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 33-C (2) and 25-F and Madras Co-operative Societies Act, (VI of 1932), section 51—Retrenchment of employee by the Society—Jurisdiction of Labour Court to take cognisance of dispute between Society and its servants —Dispute ' touching the business '—What is.

It is difficult to say that a claim for retrenchment compensation under sections 25-F of the Industrial Disputes Act can have any concern with or relation to the business of a Society, though it might be that the Society is made liable to pay retrenchment compensation to its discharged workers.

1. (1931) 27 Nag.L.R. 144.
2. (1904) I.L.R. 32 Cal. 357.

*W.P. Nos. 1023 to 1025 of 1958.

20th July, 1960.
(29th day of Asadha, 1882, Saka).

It was held in *Co-operative Mills Union Ltd.* v. *State of Bengal*, (1958) 2 L.L.J. 61: (i) that so long as a dispute is an industrial dispute, it would be governed by the Industrial Disputes Act, although that dispute was between a Co-operative Society and its workmen, notwithstanding the provisions for settlement of disputes under the Co-operative Societies Act between the contending parties ; (ii) that a dispute between a Co-operative Society and its workmen could not relate to the actual business of the society and could not therefore touch the business of such society though such dispute might ultimately touch or affect the business of the Society.

Thus (in the instant case) the claim for retrenchment compensation against the Co-operative Society would not come within the ambit of section 51 of the Madras Co-operative Societies Act and it can only be adjudged under the provisions of the Industrial Disputes Act.

It cannot be said that as the closure of a section of the business was *bona fide*, the employer would not be liable to pay retrenchment compensation.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 1023 of 1958 on the file of the High Court the High Court will be pleased to issue a write of *certiorari* calling for the records in C.P. Nos. 746, 748 and 747 of 1957, dated 24th September, 1958, on the file of the Labour Court, Madras and quash the orders therein.

T. V. Balakrishnan and *N. Vanchinathan*, for Petitioner.

K. Sarvabhauman, (Amicus curiae), for Respondents.

The Court made the following

ORDER.—These are petitions under Article 226 of the Constitution for the issue of a writ of *certiorari* to call for records in C.P. Nos. 746 to 748 of 1957, and quash the order of the Labour Court, Madras, dated 24th September, 1958.

The South Arcot Co-operative Motor Transport Society Ltd. (for Ex-Servicemen) is a Society registered under the Madras Co-operative Societies Act, 1932, and is engaged in the running of lorries and motor transport services in South Arcot District. Syed Batcha, Appadurai and Kannan were amongst those who were employed by the petitioner in the transport services. It is stated that they were also shareholders in the Society. In 1957, the Society decided to close down the lorry service and confine its activities to motor transport only. As a consequence thereof, the Society had to discharge some of its workmen. There is no controversy that the discharge proposed was anything but *bona fide*, occasioned by the abolition of a section of the petitioner's business. By the proceedings, dated 16th November, 1957, the Society dispensed with the services of five persons, amongst whom were Syed Batcha, Appadurai and Kannan. The three persons, along with another filed applications under section 33-C (2) of the Industrial Disuutes Act before the Labour Court, Madras, claiming retrenchment compensation and earned leave wages, accumulated after the date of discharge. The applications were resisted by the petitioner-Society on various grounds, the substantial objection being that the Labour Court was not competent to take cognisance of the dispute between the Society and its servants. The Labour Court held that it had jurisdiction to entertain the dispute and that Syed Batcha, Kannan and Appadurai were entitled to relief by way of retrenchment compensation, and directed the payment of various sums, assessed in accordance with section 25-F of the Industrial Disputes Act. The petitioner challenges the validity of the order of the Labour Court in the above petitions.

The main contention urged before me on behalf of the petitioner is on the question of jurisdiction of the Labour Court to take cognisance of a claim by the servants of the Society. It is contended that the claim should be deemed to be one touching the business of the Society, and that the only authority entitled to decide the claim is that prescribed by section 51 of the Co-operative Societies Act. That provision states :—

"(1) If any dispute touching the business of a registered Society (other than a dispute regarding disciplinary action taken by the Society or its committee against a paid servant of the Society) arises—

(a) ....

(b) ....

(c) between the Society or its committee and any past committee, any officer, agent or servant or any past officer, past agent or past servant, or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased servant, of the Society,

(d) ....

such disputes shall be referred to the Registrar for decision."

The learned counsel for the petitioner argued that the Industrial Disputes Act should be deemed to be a general statute, providing for adjudication of all industrial disputes, and the Madras Co-operative Societies Act must be treated as a special enactment, governing the disputes between the Society and its servants, and that, therefore, any matter coming within the scope of the latter Act should be governed exclusively by the provisions of that Act. In support of the contention, reliance was placed upon an unreported judgment of Kuppuswami Iyer, J., in C.R.P. No. 1134 of 1940. The learned Judge held that a claim by a dismissed servant of a Co-operative Society for the recovery of provident fund due to him and additional amounts due to him by way of travelling allowance and other incidental payments was a claim touching the business of the Society, and could be agitated only under section 51 of the Madras Co-operative Societies Act, and that a Civil Court would have no jurisdiction to take cognisance of the claim. In *Krishnayyar* v. *Secretary, Urban Bank Ltd.*[1], a director of a Co-operative Bank also acted as its Legal Adviser. A dispute arose between the Bank and the Legal Adviser, and the latter was called to account in regard to certain sums of money received by him, while acting as its vakil. It was held that the matter complained of, related to the conduct of the vakil acting as such, and not as a member, officer or agent of the Society, and that the Registrar had, no jurisdiction to entertain the reference. In *Madhava Rao* v. *Surya Rao* [2], a Full Bench of this Court held that the words "touching the business" should be given their full import, bearing in mind the object of the legislation, and that a dispute, in order to come under the provisions of section 51, need not directly arise out of the business of the Society but that it would be enough if it should have reference or relation to or concern with the business of the Society.

It is, however difficult to say that a claim for retrenchment compensation under section 25-F of the Industrial Disputes Act can have any concern with or relation to the the business of a Society, though it might be that the Society is made liable to pay retrenchment compensation to its discharged workers. It can be readily conceded that a compensation awardable to an employee under the provisions of section 25-F of the Industrial Disputes Act is not a claim under common law. Nor can it be said to be one in any way regulated by the Rules and Bye-laws of the Society. It is an industrial claim similar to other claims like bonus, etc., by a worker in an industrial establishment. Under the common law, there is no obligation on the part of an employer to pay compensation for retrenchment beyond what is payable to the discharged employee under the contract of service. Section 25-F is a statutory provision which entitles the workmen to compensation at the time of retrenchment. That section was introduced by way of amendment to the Industrial Disputes Act by Act XLIII of 1953. In 1956, the statute was again amended by introducing certain provisions, of which section 33-C is one. That section provided for the determination in terms of money and for recovery of money due by an employer to the employee. Recently, in W.P. No. 960 of 1958, I had to consider the scope of section 33-C (2), and I held that a Labour Court would have jurisdiction to adjudicate on claims for monetary as well as non-monetary benefits claimed by a workman against his employer. It may, therefore, be taken that the statute, which provides the right has also provided a particular form of remedy for the enforcement of that right. In the classical statement of law contained in *Wolverhampton New Waterworks & Co.* v. *Hawkesford*[3], Willes, J. observed :—

"There are three classes of cases in which liability may be established by statute. 1. There is that class where there is a liability existing at common law which is only remedied by the statute with a special form or remedy. Thus unless the statute contains words expressly excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. 2. Then there is a second class, which consists of those cases in which a statute has created liability but has given no special remedy for it ; thus the party may adopt an action of debt or other remedy at

1. (1933) 65 M.L.J. 367.
2. (1953) 2 M.L.J. 340 : I.L.R. (1953) Mad. 1047.
3. (1859) 6 C.B. (N.S.) 336, 356.

common law to enforce it. 3. The third class is where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . . . . With respect to that class it has always been held that the party must adopt the form of remedy given by the Statute."

In such a case, that is, where a new duty or cause of action is created by statute and a special jurisdiction out of the course of the common law is prescribed, resort should be had only to that jurisdiction. The legal position has been thus stated by Balakrishna Ayyar, J., in *Nagarathnammal* v. *Ibrahim Sahib*[1] :—

"Where a statute takes over and occupies a field previously not regulated by legislation, the rights and powers conferred and the obligations imposed by the Statute must be worked out within the statutory frame work. If a statute confers a particular right and prescribes a particular mode for its enforcement, the enforcement of the right must be sought in that mode."

Therefore, in regard to an industrial claim, like the retrenchment compensation, the remedy for the worker would be only to enforce it by the machinery created by the Industrial Disputes Act, namely, by section 10 and section 33-C (2). The Madras Co-operative Societies Act being itself a special statute, the authority, acting under it, would have no jurisdiction beyond what the enactment itself conferred on him. He could not, therefore, have jurisdiction to decide a dispute under the Industrial Disputes Act. In *Co-operative Mills Union Ltd.* v. *State of Bengal*[2], Mukherji, J., held that, so long as a dispute is an industrial dispute, it would be governed by the Industrial Disputes Act although that dispute was between a Co-operative Society and its workmen, notwithstanding their provisions for settlement of disputes under the Co-operative Societies Act between the contending parties. The learned Judge further held, that a dispute between a Co-operative Society and its workmen could not relate to the actual business of the Society and could not therefore, touch the business of such Society though such dispute might ultimately touch or affect the business of the Society. I am of opinion that a claim for retrenchment compensation by a workman against the Co-operative Society would not come within the ambit of section 51 of the Co-operative Societies Act, and that it can only be adjudged under the provisions of the Industrial Disputes Act.

The learned counsel for the petitioner contended that, as the closure of the lorry section of the petitioner's business was admittedly *bona fide* the workmen would not be entitled to any retrenchment compensation. Reliance was placed on the decision reported in *General Products Ltd.* v. *A. T. H. L. C. Workers Union*[3], where it was held that, where the management had closed its business on account of financial losses, the Industrial Tribunal would have no jurisdiction to award retrenchment compensation to its workers. In so holding, the learned Judge placed reliance on the decision of the Supreme Court in *Hariprasad* v. *Divelkar*[4]. In that case the Supreme Court held that retrenchment as defined in section 2 (*oo*) and as used in section 25-F had no wider meaning than the ordinary, accepted connotation of the word, namely, the discharge of surplus labour by the employer for any reason whatsoever otherwise than punishment inflicted by way of disciplinary action, and it had no application where the service of all workmen had been terminated by the employer on a real and *bona fide* closure of business. The Supreme Court made it clear that a retrenchment properly so called would imply a continuing or running of the industry. At page 132, it was observed:

"On our interpretation, in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry."

In the present case, it is admitted that the motor transport service of the petitioner continued, and that only a section of its business, namely, that related to the lorry service was closed. *Bona fide* as that may be, there has been no closure of the business of the employer as such. Therefore, when the Society proceeded to discharge its workmen, the Society should be held to have retrenched its personnel, and continued its business. I am of opinion that there is no substance in the con-

1. (1955) 2 M.L.J. 49 : I.L.R. (1955) Mad. 460 at 474.
2. (1958) 2 L.L.J. 61.
3. A.I.R. 1957 T.C. 268.
4. (1957) S.C.J. 83 : 1957 S.C.R. 121 : A.I.R. 1957 S.C. 121 (132).

tention that, as the closure of a section of the business was *bona fide*, the employer would not be liable to pay retrenchment compensation.

Before concluding I must refer to one matter : the respondents did not enter appearance. At my request, Mr. K. Sarvabooman appeared as *amicus curiae*. I must express my obligation to him for his clear and able presentation of the case on behalf of the respondents.

Rule *nisi* is discharged. Writ Petitions fail and are dismissed. There will be no order as to costs.

K.L.B. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Estate of late Sri VR. RM. S. Chockalingam Chettiar by S. VR. Veerappa Chettiar and S. V. Viswanathan Chettiar, Kanadukathan .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Kartha of Hindu Joint family leaving a will in respect of properties situate in Malaya according to the law of that country appointing his sons as executors and trustees with a direction to pay 'M' a sum of money out of the assets—Validity of the will—If assessment could be made on the footing of undivided family—If money paid to 'M' could be excluded from assessment—Section 41 of the Act—Applicability.

'*C*', kartha of Hindu Joint family consisting of himself and two sons executed a will in respect of properties situate in Malaya including certain gardens standing in the names of the sons according to the law of that country and appointed his sons, as executors and trustees with a direction to pay '*M*' (*C*'s daughter) Rs. 20,000 within a prescribed time. From 1940 '*C*' was assessed to tax in his capacity as kartha. On '*C*'s death his estate was assessed on the footing of undivided family. The sons claimed that they should be assessed individually under section 41 of the Act, that the income from the gardens in question should be excluded from assessment as they were not part of the estate of '*C*' and that a deduction should be allowed in respect of money paid to '*M*'. The Income-tax Officer negatived all these claims and passed on order which was confirmed both by the Appellate Assistant Commissioner and the Tribunal. On a Reference,

Held : (1) In regard to testamentary disposition the validity of a will disposing of immovable property would be determined with reference to the law of the land where the property is situate.

As '*C*' would have the capacity to dispose of his properties in Malaya, the disposition in the will should be held to the valid.

Hence the assessment should have been made as if the properties belonged to the estate of '*C*' in the hands of his representatives.

(2) In order that section 41 of the Income-tax Act might apply, the income should have been received by the executors in their capacity as trustees of the legatees and not in their own capacity as executors. Section 41 of the Act was held inapplicable in the instant case as it was not known when the executors began functioning as trustees.

(3) As the will purports to bequeath, all the properties of '*C*' even if the gardens in question had not been specifically referred to in the will they should be held to have been disposed of by the will and the income thereof would be assessable.

(4) Payment to '*M*' was directed to be made out of the assets and hence it cannot be revenue in nature. It could not be excluded from assessable income.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R. A. No. 107 of 1955-56 I.T.A. No. 4661 of 1954-55, Assessment Year 1951-52 on its file for decision on the following questions of law, *viz* :—

"(1) The assessee being a Hindu undivided family, is section 41 of the Income-tax Act applicable to assessment of the income arising from the two gardens in Johore Bahru aforesaid ?

(2) Could the payment of Rs. 20,000 to Meenakshi be excluded from the computation of the income of the assessee family of the year of account having regard to the terms of the will ?

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* Case Referred No. 2 of 1956. 7th May, 1960.
(17th Vaisakha, 1882, Saka).

R. Viswanathan for *T. V. Balakrishnan*, for Applicant.

C. S. Rama Rao Sahib, Special counsel for Income-tax and *S. Ranganathan*, on behalf of the Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This reference relates to the assessment of the estate of one VR. RM. S. Chockalingam Chettiar represented by S.VR. Veerappa Chettiar and S.V. Viswanathan Chettiar for the year 1951-52, the previous year ending with 13th April, 1951. Chockalingam Chettiar and his two sons, Veerappa Chettiar and Viswanathan Chettiar, were living as members of a joint family. Chockalinga acquired substantial properties in Johore Bahru, in Malaya. On the 3rd February, 1949, he executed a will in respect of his properties at Johore Bahru, in accordance with the law of that country. Shortly thereafter, that is, on 18th April, 1949, Chockalinga died, leaving behind him his two sons and a daughter, Meenakshi. Veerappa and Viswanatha were appointed as the executors and trustees under the will, and they were directed to pay Meenakshi a sum of Rs. 20,000 within two years of the death of the testator : in default Meenakshi was to obtain by way of a legacy a property, a building in the township of Johore Bahru. The testator bequeathed the residue after payment of his debts, legacies, funeral expenses and testamentary expenses as follows :

"I give devise and bequeath all the rest and residue of my property and estate of whatever nature and wheresoever situate (hereinafter called the residuary estates) unto my trustees upon the following trust, that is to say :—

(*a*) My trustees shall immediately after the expiry of three years after my death divide my residuary estate in two equal parts and shall transfer, convey and assign one such equal part to my son Ravana Mana Sona Veerappa Chettiar also known as Sona Veena Rana Veerappa Chettiar for his own absolute use and benefit. I hereby direct that the remaining equal part of my residuary estate shall be thereafter held by my son, Sona Veena Viswanathan Chettiar in trust for my grandson by the said Sona Veena Viswanathan Chettiar for a period of 16 years from my death and that after the said period of 16 years from my death my said trustees shall distribute the said remaining half of my residuary estate amongst my male grandsons by the said Sona Veena Viswanathan Chettiar who may be living at such time in equal shares."

On the death of Chockalinga Chettiar, the executors took charge of the estate. The will was duly proved and letters of administration with will annexed was granted by the Malaya Court to the attorney of the executors. The executors paid Meenakshi Achi the Rs. 20,000 within the period prescribed by the will. The payment was made during the year of account. The properties in Malaya were acquired in the name of Chockalinga himself. He was originally assessed to tax as an individual. But during the assessment year 1939-40, the assessee admitted that his status was that of a Hindu undivided family, and submitted subsequent returns in his capacity as karta thereof. In response to a notice under section 22 (2), Veerappa and Viswanathan submitted a return for the assessment year 1951-52 in their capacity as trustees of the estate of Chockalinga : they claimed that they should be assessed in their representative capacity under section 41 in two shares on the ground, that the shares had vested in the residuary legatees, that the income derived from the two gardens in Johore Bahru should be excluded from the assessment, as the properties which stood in their respective names were not part of the estate of the deceased, and that a deduction should be allowed in respect of the sum of Rs. 20,000, paid to Meenakshi Achi during the year of account. The Income-tax Officer held that, having regard to the changes of the status accepted by Chockalingam Chettiar in 1939-40, the status of the assessee was that of a Hindu undivided family, and that the estate of the deceased should be assessed on that footing. The two gardens in Johore Bahru were held part of the joint family assets not being the exclusive or separate properties of the sons, and the income therefrom was included in the assessments. The claim for deduction in respect of Rs. 20,000 was negatived on the ground that it was not a charge on the income. The Appellate Assistant Commissioner was of the view that the status of the assessee would be that of a Hindu undivided family till at least three years after the death of Chockalinga, the period of distribution specified in the will. He confirmed the

assessment made by the Income-tax Officer. On further appeal, the Tribunal negatived the claim of the assessee to be assessed under section 41, as it held that the will of Chockalinga being that of a member of Hindu coparcenary with regard to joint family property was invalid, and that Veerappa and Viswanatha were liable to be assessed as a Hindu undivided family. The Tribunal further affirmed the view of the officers of the department that the income from the two gardens should be included and that the payment made to Meenakshi Achi could not be deducted from the assessable income.

The following questions were, thereupon, referred for our opinion under section 66 (1) of the Indian Income-tax Act :—

"1. The assessee being a Hindu undivided family, is section 41 of the Income-tax Act applicable to assessment of the income arising from the two gardens in Johore Bahru aforesaid ?

2. Could the payment of Rs. 20,000 to Meenakshi be excluded from the computation of the income of the assessee family of the year of account having regard to the terms of the will ?"

It is obvious that Question No. 1 has not been correctly framed. It comprises of two parts, namely, (1) the validity of the assessment on the footing that the assessee was a Hindu undivided family ; and (2) the propriety of the inclusion of the income from the two gardens in Johore Bahru. In order to bring out the real points that arise in the Reference, it is necessary to recast the questions. The questions that arise are :—(1) Whether the assessment on the estate of late VR. RM.S. Chockalingam Chettiar by S. VR.. Veerappa Chettiar and S. V. Viswanathan Chettiar was validly made in the status as Hindu undivided family ; (2) whether the assessee is liable to be assessed under section 41 of the Income-tax Act; (3) Whether the income arising from the two gardens in Johore Bahru would be liable to be included in the assessment ; and (4) is the payment of Rs. 20,000 to Meenakshi Achi liable to be excluded from the computation of the Income ?

Question No. 1 : The name of the assessee in the assessment proceedings is given as the estate of Chockalingam Chettiar by Veerappa Chettiar and Viswanathan Chettiar. At the same time, the status of the assessee is described as Hindu undivided family. If the assessee is a Hindu undivided family, it is difficult to conceive how there could be any assessment of the estate of a deceased member of that family. In *Meenakshi Achi* v. *Ramaswami Chettiar*[1], it was held that a suit for administration of the estate of a person who died a member of joint Hindu family could not be maintained, unless, the deceased left separate property (which would be his estate). The reason is that under the Mithakshara law, the member's interest in the family property devolves by survivorship on his death, in favour of the other coparceners. In *Attorney-General of Ceylon* v. *Arunachalam Chettiar*[2], it was held that, where one of two coparceners in a Hindu undivided family died, his interest would not amount to a property which would pass on his death in favour of his survivor, and that his share was not liable to the estate duty in the hands of the survivor under the Estates Duty Ordinance of Ceylon. It follows that, if Chockalinga died, a member of a Hindu undivided family, there would be no estate left by him in the absence of any separate property of his, and there could be no valid assessment of the estate as such. Thus, if the assessment is of the estate of the deceased in the hands of the executors under the will, no question of assessment as a Hindu undivided family could arise. If, on the other hand, the assessment is on the survivors or successors directly, it may be that they hold the property as members of a Hindu undivided family, and be liable to be assessed as such.

We shall, next, consider whether the properties in Johore Bahru could be testamentarily disposed of by Chockalinga, so that the title of the executors could only be under the will. It is conceded that the law of Johore Bahru does not recognise a joint Hindu family as a unit which could own property. Under the law, it would be competent for an acquirer of property to dispose of it as his own property.

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1. (1939) 2 M.L.J. 653 : I.L.R. (1939) Mad. 820 : A.I.R. 1939 Mad. 552.
2. L.R. (1957) A.C. 513.

Therefore, it would be competent for Chockalinga to dispose of his properties by a will. The validity of a disposition of immovable property has to be considered only according to the law of the country (that is, *lex loci* or *lex situs*) where the property is situate. Dicey states in his work on the Conflict of Laws (17th Edition) at page 512 :

> "*Rule* 85. All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*.)

The learned author states that, as a general rule, all questions that arise concerning rights over immoveables (land) are governed by the law of the place where the immovable is situate (*lex situs*) and that this principle applies to rights of every description. Further at page 514, it is stated :—

> "A person's capacity to alienate an immovable by sale or mortgage *inter vivos* or to devise an immovable, is governed by the *lex situs*. The *lex situs* means, for an English Court dealing with land in England, English domestic law, and means, for an English Court dealing with land abroad, whatever system of domestic law the *lex situs* would apply."

It is well settled that the persons entitled to succeed to immovable property belonging to an intestate are determined by the law of the land where the property is situate, namely, *lex situs* or *lex loci*. Similarly, in regard to testamentary disposition, the validity of a will, disposing of immovable property would be determined with reference to the capacity, formalities and material essential validity by the *lex loci rai sitae*? (*Vide*: 7 Halsbury, Simonds Edition 51). The law on this point is stated by Cheshire in his book on Private International Law (5th Edition) at page 571 :—

> "Accordingly, where the owner of immovables dies intestate, the order of descent or distribution prescribed by the *lex situs* is applied by the English Court no matter what his domicil may have been....."

> "With regard to wills of immovables the rule of common law is that it is the *lex situs*, and the *lex situs* exclusively, which decides whether the testator has capacity, whether the appropriate formalities for the making or for revocation of a will have been observed, whether the testator has disposition and whether the interest devised is essentially valid. The law of the testator's domicil has no effect upon these matters, whether the subject-matter of the will is a freehold or a leasehold interest."

In the present case, the Tribunal has held that the grant of letters of administration with will annexed in Malaya in respect of the properties in Malaya would hold good to that extent. The validity of a testamentary disposition in regard to immovable properties situate in a foreign country is a question relating to foreign law. Such a question would be a question of fact, and in view of the conclusion of the Tribunal that under the law in Malaya the letters of administration granted would be valid, no question either of the validity of the will or of the rights of the Hindu undivided family over the properties disposed of can at all arise.

The learned counsel for the department relied on the decision of the Privy Council in *Nataraja Pillai* v. *Subbaroya Chettiar*[1]. In that case, a Hindu widow domiciled in Pondicherry in French India who had properties in British India as well, adopted a son, which adoption according to the French Law, could be done without the consent of sapindas. A question arose whether the adopted son would be entitled to the immovable properties in the then British India, which did not recognise an adoption by a widow without the authority of her sapindas. The Privy Council held that the adopted son would be entitled to the properties in British India as well, even though such adoption would not have been valid in the British India. The question to be decided in that case did not concern itself with the transfer of property in a foreign country. Adoption is a question of status. That had to be decided with reference to the law of domicile, namely, the French Law. Once the status was established it followed that the adopted son would become entitled to all the rights which would accrue to him by virtue of that status. It cannot be said, therefore that the Privy Council recognised any principle contrary to the accepted one under the International Law, namely, that succession to or a disposition of a property situate in a foreign country could be determined by the *lex loci* or *lex situs*. Therefore, the validity of Chockalingam's will will have

1. (1950) 1 M.L.J. 172 : L.R. 77 I.A. 33 : I.L.R. (1950) Mad. 862 (P.C.).

to be decided by the law in Malaya, and it is conceded that under that law it would be void. The two sons have accepted office as executors, and it would not be open to them even to assert a title contrary to the will. As Chockalinga would have the capacity to dispose of the properties standing in his name in Malaya, the dispositions in the will should be held to be valid. That apart, it is now well settled that a member of a joint family could dispose of his interest in the family properties by a will, provided all the other members assent to it. Such a disposition has been upheld as a family arrangement. In the present case, no member of the family has repudiated the will. It would not be open to the Department, in these circumstances, to declare the will void, and proceed to assess as if the properties belonged to the Hindu undivided family. The assessment should, therefore, have been made as if the properties belonged to the estate of Chockalinga in the hands of his representatives. Question No. 1 will, therefore, be answered in the negative.

Question No. 2 : In order that section 41 of the Income-tax Act might apply, the income should have been received by the executors in their capacity as trustees of the legatees and not in their own capacity as executors. Mr. Rama Rao Sahib contended that, on the terms of the will, the executors would have to function as such for 3 years after the death of the testator, and it was only thereafter that they could be held to have completed administration and held the properties as trustees. We cannot agree. Clause (3) (*a*) relates only to the division of the property, and cannot be held to postpone the administration or the vesting of the property in the legatees. The presumption of law is in favour of early vesting. The disposition in favour of Meenakshi (the only specific legacy) shows that the testator intended an earlier administration. It cannot, therefore, be inferred that the executors necessarily continued in office till 18th April, 1952. But it has still to be ascertained when the executors ceased to function as such and became trustees of the residuary legatees. Under the will, the residue could be ascertained only after payment of the legacy, to Meenakshi Achi, the payment of the debts, other legacies, funeral and testamentary expenses. The legacy of Meenakshi Achi was paid during the year of account. There are no materials on record to show whether the administration of the estate had been otherwise complete by then or whether the executors have assented to the vesting of the residue in the residuary legatees. Section 41 of the Indian Income-tax Act would come into play only when the executors have completed their executorial functions and became trustees for the persons beneficially entitled under the will. The will appoints Veerappa and Viswanathan both as executors and trustees. They imply two distinct capacities. In *Lord Brougham* v. *Lord William Poulett*[1], Sir John Romilly, M. R., dealing with a case where a testator had, by his will, appointed executors as his trustees, observed at pages 133 and 134 :

> "Their characters are frequently, as they are in this will, united in the same persons, but they are in themselves distinct, and the executorial character, which begins at the death of the testator, may merge into the character of trustee, which begins at a later period, and for the most part, when the executorial duties relative to the trust fund have ceased. This distinction is a very familiar one. For the most part, the executorial duties consist in ascertaining the proper nett amount of the various parts of the testator's property, after payment of debts and expenses, and distributing them amongst the persons entitled: these persons may be trustees, who hold it in trust for others, and they themselves may be, and frequently are, the trustees who receive or retain, as trustees, the fund ascertained by themselves as executors."

The office of an executor is distinct from that of a trustee, though in some sense he may be a trustee or accountable as trustee. So long as he is an executor, he holds the property of the deceased in his own right, as his legal representative and not on behalf of the beneficiaries . He would continue to hold in that capacity till the estate is cleared by the payments of debts, testamentary expenses and specific legacies. In other words, after clearing the debts and paying the funeral and testamentary expenses, the specific legacies have to be paid and the surplus ascertained, and then when there is assent to the vesting of the residue, the executor would be held to have shed his character as executor and would hold the property as a trustee

1. (1895) 52 E.R. 294 : 19 Beav. 119 (133, 134).

for the legatees, etc. In *Taran Singh Hazari* v. *Ramratan Tawari*[1], the learned Judges observed at pages 92 and 93 :

> " The position and duties of an executor in this country are not very well understood, and considerable confusion exists as to duties of the executor in administering the estate. The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf."

Sections 333 and 336 of the Indian Succession Act declare that the title of a legatee is completed only by the assent of the executor. Therefore, till the estate has been administered by payment of the debts of the deceased, the testamentary and funeral expenses and of specific legacies and till there has been an assent to the vesting of the residue, the office of executor would subsist. It is only after completing the administration in the manner stated above that the executor will become a trustee for the beneficiaries in regard to the undistributed properties. In *Raghavalu Naidu* v. *Commissioner of Income-tax*[2], Viswanatha Sastri, J., stated the position thus at page 807 :

> " The question in each case is, has the administration reached a point at which you can infer that the administration has been completed, the residuary estate has been ascertained, the bequest of the residue has been assented to and the residuary estate therefore became vested in trustees, be they the executors, themselves or strangers. In other words, can it be said that the residuary estate had taken concrete shape and could and should have been handed over by the executors to the persons beneficially entitled but for the fact that the estate is settled in trust and vested in the executors as trustees?"

The important point to consider is whether the administration of the estate by the executors in the present case has been completed. If such administration has not been completed, the executors would have been in receipt of the income only in their capacity as executors and they would be liable to be assessed only as executors, that is, as one unit. If, on the other hand, the executors had completed the administration before the year of account, and assented to the legacies including the residuary legacy, they would be in receipt of rents only in their capacity as trustee, and the provisions of section 41 of the Indian Income-tax Act would apply to the assessment. As we stated before, the payment of legacy to Meenakshi Achi was made only during the year of account. Therefore, there is no question of the executors being trustees earlier than when the legatee was completely paid off. Even then the further question which has got to be considered is, whether the administration was otherwise complete during the year of account, and if so, when ? If that date is ascertained, the executors would be liable to be assessed as one unit until then. Thereafter they could be assessed as trustees indirectly under section 41 with an option in the Department to assess the beneficiaries. We, therefore, answer the 2nd question in this manner, namely, that section 41 of the Indian Income-tax Act would not apply to the assessment, unless it were shown that the executors had discharged themselves from their position as executors and began functioning as trustees for the beneficiaries under the settlement.

Question No. 3—As regards the two gardens standing in the names of Veerappa and Viswanathan, the finding of fact arrived at by the Tribunal is that they were purchased out of the monies supplied by Chockalinga. The will purports to bequeath all the properties of Chockalinga. Therefore, even if these two gardens had not been specifically referred to in the will or in the letters of administration which was granted, they should be held to have been disposed of by the will and the income therefrom would have to be treated as income of the estate of the deceased. Question No. 3, is therefore, answered in the affimative.

Question No. 4 :—Payment to Meenakshi Achi was directed to be made out of the assets left by the deceased. It cannot, therefore, be of revenue, in nature. That amount could not, therefore, be excluded from the assessable income. The question is answered in the negative. In the circumstances of the case we make no order as to costs.

K.L.B. —— *Reference answered.*

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1. (1904) I.L.R. 31 Cal. 89.

2. (1950) 2 M.L.J. 300 : 18 I.T.R. 787, 807.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

N. Manickam* .. *Petitioner**

v.

Arunagiri and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), section 16 (1)—Disqualification under—When incurred.

To satisfy the requirements of section 16 (1) of the Madras Village Panchayats Act, 1950, it is not enough if there is a conviction. The offence for which the person has been convicted should involve moral delinquency and the sentence imposed following the conviction for such an offence should have been one of imprisonment for a period of more then six months. The conviction, sentence and the extent of the sentence specified under section 16 (1) should be established before disqualifying a person under it.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Election Commissioner, Erode (District Munsif, Erode), in O.P. No. 73 of 1958 on his file, dated 29th January, 1960 and quash the same.

G. Gopalaswami and *A. S. M. Sahul Hameed*, for Petitioner.

R. Gopalaswami Ayyangar and the Additional Government Pleader (*M. M. Ismail*) and *K. Swamidurai*, for Respondents.

The Court made the following

ORDER.—The petitioner and respondents 1 to 3 contested the election for Block No. 2 in Ward No. 2 of the Bhavani Panchayat. 10th October, 1958 was the date of the poll. On 13th October, 1958, the petitioner who had secured 274 votes as against his nearest rival, the first respondent who got 216 votes was declared elected. The first respondent filed O.P. No. 73 of 1958 to set aside the election of the petitioner. The contention was that even on the date of the nomination the petitioner was disqualified under section 16 (1) of the Madras Village Panchayats Act (X of 1950). It was not disputed that on 31st December, 1957, the petitioner was convicted by the Second Presidency Magistrate, Madras, in C.C. No. 7227 of 1957 under section 409, Indian Penal Code. The petitioner was sentenced to undergo imprisonment till the rising of the Court and to pay a fine of Rs. 50. The petitioner's attempt to have the conviction and sentence set aside in Revision by the High Court failed, and the High Court dismissed the petition preferred by him, Criminal Revision Case No. 387 of 1959. Along with C.C. No. 7227 of 1957 there was another case, C.C. No. 7226 of 1957 in which also the petitioner was convicted, but that conviction was eventually set aside in Revision by the High Court in Criminal Revision Case No. 386 of 1959.

The petitioner's contention, that since the term of imprisonment was less than six months, the imprisonment awarded was only till the rising of the Court, the requirements of section 16 (1) of the Act were not satisfied, was overruled by the Election Commissioner, and he allowed O.P. No. 73 of 1958 and set aside the election. The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Election Commissioner, dated 29th January, 1960.

Section 16 (1) provides :

"A person who has been sentenced by a criminal Court to transportation or to imprisonment for a period of more than six months for any offence other than an offence not involving moral delinquency, such sentence not having been reversed or the offence pardoned, shall be disqualified for election as a member while undergoing the sentence and for five years from the date of the expiration thereof.

Provided that the Government may direct that such sentence shall not operate as a disqualification.

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*W.P. No. 201 of 1960.

18th August, 1960.
(27th Sravana, 1882, Saka).

This is not a case which came within the scope of the Proviso ; nor was it a case of the sentence in C.C. No. 7227 of 1957 having been reversed or the offence involved therein having been pardoned.

To satisfy the requirements of section 16 (1) it is not enough if there is a conviction. The conviction must be followed by a sentence. The conviction itself must be for an offence involving moral delinquency. If the conviction and sentence were for an offence not involving moral delinquency, section 16 (1) did not come into play at all, whatever was the nature of the sentence. In cases involving moral delinquency section 16 (1) further stipulated that the sentence should be for a period of more than six months duration. It would therefore follow that, even in cases involving moral delinquency, if there was a conviction but no sentence at all, the person would not incur the disqualification under section 16 (1). Again, if in a case involving moral delinquency the conviction was followed up by a mere sentence of fine, the disqualificacation imposed by section 16 (1) would not come into play. On the same lines I have to hold that in cases involving moral delinquency, if a sentence of imprisonment was imposed, but that sentence was less than six months in duration, the disqualification imposed by section 16 (1) did not come into play. To incur the disqualification under section 16 (1) of the Act not only must the offence of which the person has been convicted involve moral delinquency, but the sentence imposed following the conviction for such an offence involving moral delinquency must have been one of imprisonment for a period of more than six months. In the case of the petitioner the latter test was not satisfied. He was no doubt convicted under section 409, Indian Penal Code. It was an offence that involved moral delinquency. But the sentence was less than six months. The petitioner did not incur the disqualification imposed by section 16 (1).

The learned counsel for the first respondent urged that the use of the expression " for any offence other than an offence not involving moral delinquency " justified the interpretation, that where *any* sentence is passed for an offence involving moral delinquency the disqualification imposed by section 16 (1) came into play irrespective of the nature of the sentence or the duration of the imprisonment. The learned counsel pointed out that in Act XXXV of 1958, section 25 (1), which to some extent corresponds to section 16 (1) of Act X of 1950, the provision made was :

" A person who has been sentenced by a criminal Court to imprisonment for any offence involving moral delinquency, such sentence not having been reversed, shall be disqualified for election as member while undergoing the sentence and for five years from the date of the expiration thereof."

The expression used there is " for any offence involving moral delinquency." The expression used in section 16 (1) of Act X of 1950 is for an offence other than an offence not involving moral delinquency. The effect is the same. I am unable to look upon section 25 of Madras Act XXXV of 1958 as throwing any light on the interpretation of section 16 (1) of Act X of 1950. Certainly it does not support the contention of the learned counsel for the first respondent, that where a person is convicted of an offence involving moral delinquency he incurs the disqualification under section 16 (1) whatever might have been the sentence imposed upon him. Once again I have to emphasise that what section 16 (1) requires is not only a conviction but also a sentence, and the extent of the sentence has also been specified in section 16 (1).

The Election Commisisoner's interpretation of the scope of section 16 (1) constitutes a clear error of law apparent on the face of the record. The petitioner did not incur the disqualification imposed by section 16 (1) of Act X of 1950. The rule *nisi* is confirmed and a writ of *certiorari* will issue to set aside the order of the Election Commissioner, dated 29th January, 1960, in O.P. No. 73 of 1958. No order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

V. Subbarayalu .. *Petitioner**

v.

The Superintendent of Post Offices, East Thanjavur Division, Nagapattinam and another .. *Respondents.*

Constitution of India (1950), *Article* 311—*Scope—Extra departmental Branch Post Office—Person in charge not a member of civil service within the meaning of Article* 311 (1)—*Removal of the person from service (without proper enquiry) under Schedule I-B-2* (a) (iii) *of the Schedule of Administrative Powers of the Officers of the Indian Posts and Telegraphs Department not violative of Article* 311 (2).

It is exceedingly difficult to accept the contention that the appointment of the petitioner to be in charge of an extra departmental Branch Post Office immediately makes him the member of a service. A service constituted by the Government would call for the sanction of a definite number of posts, a fixity of tenure and a definiteness about the emoluments and other privileges. If the connotation of the expression " civil service under the Union or the State " carried with it the above implications, it has not been shown that there is any service that could be so-called, which is not attended by such features. Therefore the petitioner cannot be regarded as belonging to any recognised civil service.

The relationship between the Government and the petitioner was not that of an employer and an employee ; it was only contractual. The petitioner was only an agent for the discharge of specified functions of the Postal Department. The contract of agency was terminated and Article 311 cannot apply to termination of contracts. Though the petitioner was not given a full opportunity to show cause against the termination of the contract of agency, in the case of an alleged breach of contract, there is no scope for invoking principles of natural justice. Hence the petitioner is not entitled to the constitutional protection of Article 311 of the Constitution.

Ch. Venkataswamy v. *Superintendent of Post Offices*, A.I.R. 1957 Orissa 112, followed.

Brojo Gopal Sarkar v. *Commissioner of Police*, A.I.R. 1955 Cal. 556, *Karuppa Udayar* v. *State of Madras*, (1956) 2 M.L.J. 15, distinguished.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order, dated 4th May, 1956, in No. F-1/2/55 the Superintendent of Post Offices, East Thanjavur Division, Nagapattinam, the 1st respondent herein regarding removal of the petitioner from service as Branch Postmaster and quash the said Order.

K. S. Naidu and *R. Krishnamurthy*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*M. M. Ismail*), for Respondents.

The Judgment of the Court was delivered by

Srinivasan, J.—The question that arises in this petition is whether the petitioner is entitled to the protection of Article 311 of the Constitution.

The petitioner was appointed to act as the Branch Postmaster, Kilayur, Nagapattinam, with effect from 6th February, 1949, by the Superintendent of Post Offices, East Thanjavur Division. On 12th October, 1955, the Inspector of Post Offices, Nagapattinam, issued an order that

"pending further enquiries into the complaint of alleged non-payment of a money order payable to Smt. Jaithoon Bivi, Kilayur, Shri V. Subbarayalu, Branch Postmaster, is temporarily kept out of employment with effect from the afternoon of the 12th October, 1955".

The petitioner claims that he repudiated the suggestion that he was responsible for the non-payment of the money order and demanded an enquiry. No enquiry was however held. He corresponded with the Inspector of Post Offices and was informed by that Officer that the matter had been referred to the Superintendent of Post Offices, East Tanjore Division, and that he would be communicated with in due course. But, immediately upon this letter, an order was received by him from the Superintendent of Post Offices, East Tanjore Division, removing him from service as Branch Postmaster, Kilayur, under the powers vested in him by the Schedule of Administrative Powers

*W.P. No. 527 of 1957. 23rd August, 1960.
(1st day of Bhadra, 1882, Saka.)

of the Officers of the Indian Posts and Telegraphs Department. He preferred an appeal to the Postmaster-General, Madras Circle. It appears that that appeal was rejected and orders rejecting the appeal received by the petitioner after filing of this petition under Article 226.

The petitioner attacks the order removing him from service as illegal and without jurisdiction. He claims that no charge was framed against him and no enquiry held. He claims further that he had been employed in the Postal Department as a Postman of the Head Post Office, Tiruchirapalli, between 1930 and 1943 and that he had an unblemished record of service. It may be mentioned here that the order removing the petitioner purports to have been made on account of unsatisfactory work, during the period of his employment as Branch Postmaster, Kilayur. The petitioner complains that during his service as Branch Postmaster there having been no occasion when his work had been found fault with, this charge of unsatisfactory work, no particulars of which were ever given to him and opportunity afforded to refute that charge, is wholly baseless. He also complains that the departmental rule relying upon which the order of removal was passed is violative of Article 311 (2) of the Constitution and the principles of natural justice.

In the counter-affidavit of the respondent, the Superintendent of Post Offices, Nagapattinam, the stand has been taken, that the Post Office in question is only an extra-departmental Branch Post Office, the Postmaster of which is only a part time servant. The respondent disclaims all knowledge of the previous service of the petitioner as Postman in Tiruchirapalli Circle between 1930 and 1943. It is stated that during the period he was employed as Branch Postmaster, Kilayur, there had been several occasions when his work was found to be very unsatisfactory in the years 1952-1953 and 1955 and he had in fact been duly warned. A final warning is said to have been issued to him that he would be summarily removed from service in case of complaints in future. It is claimed that there was an enquiry into the alleged non-payment of the money order and that the petitioner was questioned in that regard and his statement recorded on 11th October, 1955. Pending further enquiry, the petitioner was " kept out of employment "; probably the expression is used as synonymous with " kept under suspension. " It is stated that the petitioner asked for no further enquiry at that stage. In the course of the enquiry, however, irregularties in the discharge of his duties came to notice. No action was thereupon taken in respect of the allegation of the non-delivery of the money order, but the powers available to the Dpepartmental Officers under Schedule 1-B-2 (*a*) (iii) of the Schedule of Administrative Powers was relied upon in removing the petitioner from service.

The other contentions set up in the counter do not require to be mentioned. It would be sufficient to state that the respondent purports, to maintain that the petitioner being only extra-departmental Branch Postmaster, he is excluded from the operation of the Civil Services (Classification, Control and Appeal) Rules. It was also reiterated that the petitioner is only a temporary part-time government servant and is not entitled to the constitutional protection of Article 311 (2) of the Constitution. The petitioner has been removed in accordance with the rules and no justiciable right of the petitioner has been contravened by any of the orders of the authorities.

In the supplemental counter-affidavit filed on behalf of the respondent, the matter has been somewhat elaborated. It is stated therein that the Branch Post Office at Kilayur is an extra-departmenal Post Office and the persons in charge of such Branch Post Offices are not members of a civil service or holders of civil posts within the meaning of Article 311 (1): In explaining more fully the status of such Branch Post Offices, a historical account has been placed before us. It is shortly that this system of extra-departmental Post Offices was introduced as long back as 1867 or even earlier, and that from the annual reports on the operation of Post Offices in India for the year 1867-1868, the following position emerges. This report refers to the fact that new offices which were opened were not permanently sanctioned and that a large number of these new offices were on a very inexpensive footing, many of them being in charge of Village School Masters who received small allowances for discharging postal duties. In the Annual Report on the operation of the Post Offices, 1880-1881, it is stated,

"Considerable success has attended the efforts made to increase the number of Post Offices by the employment of cheap agencies, a system under which school-masters, shop-keepers and others are entrusted with postal work for the conduct of which a small monthly allowance is given.."

In another part of the same Annual Report, the following finds place :

"Efforts were directed towards the multiplication of Post Offices by the employment of cheap agencies. Under this system, school-masters, shop-keepers, government pensioners and others are entrusted with post work, for the conduct of which a small monthly allowance is given. This is an economical method of extending postal facilities to places which are too poor to support an independent Post Office."

In the Report for 1881-1882, it was noticed :

"Much has specially been done in the direction of entrusting school-masters with postal work. The Postmaster-General of Bengal states that 'it is quite impossible to satisfy all the applicants who would like to have school-master Post Offices in their villages'."

Along with the supplemental counter-affidavit, an extract from a publication which appears to be known as "The Post Office of India and Its Story" by Geoffroy Clarke, I.C.S., has been filed. The relevant portions thereof are extracted below :

"The real business of the Department, however, is performed by Post Offices, and these are divided into Head, Sub-and Branch Post Offices. The Head Office is the account and controlling office of one or more districts. The Sub-Office is under the control of a Head Office for account purposes. It does all kinds of postal work and is opened where there is a sufficiency of correspondence to justify its existence. The Branch Office is only intended for villages and places where there is no need of a Sub-Office. In small places a Branch is put in charge of a school-master, a shop-keeper or any other local resident who has sufficient education to keep the very simple account required, and by this means the Post Office is able to give the advantages of its great organisation to villages which could never support a departmental office. A still cheaper agency is used for the outlying hamlets.. . .....These are visited periodically by the village or rural postman, who is a kind of perambulating Branch office......"

On the basis of these early records it is claimed by the respondent that the scheme as envisaged above is being continued even today and has been extended to serve a large number of villages. It is stated that in Madras Circle alone there are about 7,354 permanent and 1,480 temporary Agency extra-departmental Post Offices. It is stated alo that in the Manual of Appointment and Allowances of Officers of the Indian Posts and Telegraphs Department, these extra-departmental agents have been specifically excluded from the operation of Civil Services (Classification, Control and Appeal) Rules. On the basis of these features, the contention is put forward that persons in charge of these Post Offices, or more correctly, extra-departmental agents do not hold any civil post so as to attract the provisions of Article 311 (1) of the Constitution.

The matter in controversy is apparent from what has been stated above. While the petitioner claims that he is the holder of a civil post, the respondent asserts that it is a mere contract of agency which has been entered into between the Government in the Postal Department, on one hand, and the petitioner, on the other, that the petitioner is not a member of civil service and does not hold a civil post. It is claimed that this contract of agency could be terminated at any time and that while the petitioner could or could not agitate a claim in damages for breach of contract, it is not open to him to demand the specific protection under Article 311.

In order to understand more clearly the exact relationship between the petitioner and the Government in the Postal Department, a reference has to be made to the Departmental Manual. Part I of this Manual deals with the classification and status of the services in Chapter I. Under rule 2, of this Chapter four classes of services in the Indian Posts and Telegraphs Department are specified. Rule 3 gives further details of the status of the members of such services. Rule 4 reads :

"The following staff are wholly excluded from the operation of Civil Services (Classification, Control and Appeal) Rules by the substantive part of rule 3 thereof........

(vi) Extra-Departmental Agents."

Part IV of this Manual relates, to services excluded from the operation of Civil Services (Classification, Control and Appeal) Rules. Rule 144 of this Part states that extra-departmental agents employed in the Department are in receipt of fixed rates of pay and rule 145 refers to the allowances which extra-departmental Special and Branch Postmasters are entitled to. In the Annexure to the Chapter, the following finds place :

"The monthly allowance of extra-departmental Sub-Postmasters......should be fixed at the discretion of the Head of the Circle concerned with reference to the actual requirement in each office and the availability of the services of a suitable extra-departmental Sub-Postmaster (*viz.*, a retired postal official, or a retired postal, railway or canal signaller or telegraphist)".

The other rules in this Annexure deal with the basic allowances to be granted to these extra-departmental Branch Postmasters and agents, to which no specific reference is called for.

In Volume III of the Posts and Telegraphs Manual setting out the Schedule of Administrative Powers of the Officers of Indian Posts and Telegraphs Department, a separate Schedule I-B is provided to deal with the rules relating to appointments, penalties and appeals of employees excluded from the operation of the Civil Services (Classification, Control and Appeal) Rules. These Rules have been framed by the Director-General in the case of such employees, among whom are extra-departmental agents. Generally speaking, the appointing, punishing and appellate authorities in respect of extra-departmental Postmasters are to be the same as those for departmental Postmasters. In the case, however, of extra-departmental agents, rule 2 provides for the imposition of the following penalties, *viz.*, (1) recovery from allowance of the whole or any part of pecuniary loss caused to Government by negligence or breach of rules ; (2) removal or dismissal from service for some specific offence such as any participation in fraud, etc., and (3) removal from service for unstisfactory work or doubtful character. Rule 3, which provides for procedure relating to the imposition of these penalties specifically states that it is only in the case of the first two penalties referred to above that the employee should be given an adequate opportunity of making any representation that he might desire to make and for such representation, if any, to be taken into consideration before the order is passed. This rule excludes removal from service for unsatisfactory work as a penalty in respect of which an opportunity is required to be given to the extra-departmental agent.

It is upon these rules and the conditions under which the petitioner was appointed as an extra-departmental agent, that the respondent relies in seeking to make out that the petitioner is not entitled to the protection of Article 311.

Under Article 311 (1) no person, who is a member of a civil service of the Union or of an All-India Service or the Civil Service of a State, or holds a civil post under the Union or a State, shall be dismissed or removed by an authority subordinate to that by which he was appointed. Article 311 (2) provides that no such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. In order, therefore, that a person can invoke the protection of this Article, it has firstly to be established that he is either in the Civil Service of the Union or the State or holds a civil post under the Union or the State. Neither expression "civil service" not "civil post" has been defined in the Constitution. In that context civil post could only mean a civil post not included in any civil service. We have to decide whether the petitioner was a member of a civil service or at least whether he held a civil post not included in any civil service.

Before proceeding to do so, we may refer to what appears to be an outstanding feature in the set up of Post Offices of the kind concerned in this petition. It is to our minds fully established that in a place where postal facilities do not exist and the Government in the Postal Departments desires to extend such facilities, a Post Office is not set up at the outset. The setting up of a Post Office in such place depends upon whether a suitable person to be in charge of postal duties is available. Such Post Offices are not entrusted with all the functions which one finds associated with the regular Post Offices. More often than not, receipt and distribution of mail and the receipt and issue of money orders are the sole items of work entrusted to such offices. That appears to be for the reason that the volume of postal traffic, if it might be so called, arising in that locality is not sufficient for the maintenance of a permanent office, and the Government may, if conditions are not suitable, withdraw these facilities from that locality, and leave it to be served by the main regular Post Office of the region. In the matter of the selection of the person to be in charge of

such simple functions as are to be discharged, the Department generally picks out a school-master or a shop-keeper or other local resident with enough literacy to enable him to discharge such duties. Such a person may be a retired official of small status. He may even be a working school-master or a landlord. This system is intended not to occupy the whole time of the individual concerned. What appears to be a striking aspect of this system is that the setting up of a Post Office or the extension of postal facilities to a locality is dependent upon the availability of a suitable person in that locality. After all, if it was the intention of the Government to set up a regular Post Office or man it with its permanent or temporary employees recruited in the usual manner, it would not be very difficult. But the main purpose underlying this system seems to be that the operation of such a local unit should be restricted considerably and any local resident who is suitable enough to handle these duties should perform them without any detriment to his other and normal avocations. As the learned Advocate-General put it, it is the man that makes the Post Office, not that the Post Office calls for the appointment of an individual to be in charge of it.

It is exceedingly difficult to accept the contention that the appointment of the petitioner to be in charge of a Branch Office of this nature immediately makes him the member of a service. A service as ordinarily understood is composed of a certain number of persons employed on certain regular terms, either for a specific period or till the person reaches what is called ths superannuation age. A member of such a service is liable to serve the Government, within limits, anywhere he might be posted ; he is also entitled to certain privileges and protection. Normally speaking also, a service constituted as such by the Government would call for the sanction of a definite number of posts, a fixity of tenure and a definiteness about the emoluments and other privileges. If the connotation of the expression " civil service under the Union or the State " carries with it the above implications, in fact, our attention has not been drawn to any service that could be so-called, which is not attended by such features, it is not difficult to see that the Branch Postmaster or the extra-departmental agent such as the petitioner cannot be regarded as belonging to a service. The extra departmental Branch Postmaster do not constitute any recognised civil service.

We have found upon the records placed before us by the Department that the setting up of a Branch Post Office or its withdrawal is a matter which lies entirely within the discretion of the Departmental Officers, chiefly the Superintendent of Post Offices of the area. It is significant also that the remuneration, or other allowance to be granted to a person placed in charge of such a branch Post Office is also left entirely to the discretion of that Officer, except that certain maxima have been prescribed. If the Department finds that the postal work in that locality is not of sufficient volume to justify the retention of the Branch Post Office, the Department is at liberty to cease the postal operations connected therewith and obviously the Branch Postmaster or the extra-departmental agent loses the allowance which he was being granted for the discharge of duties connected with that Branch Post Office. We do not understand the petitioner to contend that in such an event he would be entitled to demand that he should be continued as the Branch Postmaster of another Branch Post Office. In fact, one of the special qualifications of a person in the position of the petitioner is that he should be a resident of the locality where this Branch Post Office is brought into existence.

An even more significant feature to which a passing reference was made by the learned Advocate-General in the course of his arguments was this. It appears that these Branch Postmasters or extra-departmental agents are competent to avail themselves of leave after putting their own nominees, agents or servants in charge of the Post Office. This point has been referred to in *Ch. Venkataswamy* v. *Superintendent of Post Offices*[1]. This would be an extraordinary feature if the post to which the Branch Postmaster had been appointed was a civil post or was included in any civil service under the Government. In addition, according to the rules governing

1. A.I.R. 1957 Orissa 112.

the appointment of such persons as the petitioner, it seems to be the overriding consideration that the persons appointed to these posts should have sources of income apart from the allowances granted for the postal work and should also be persons resident in the locality where their postal services are required.

The Orissa decision that we have referred to above dealt with a similar case of extra-departmental Branch Postmaster. The learned Judges came to the conclusion that from the very nature of his employment and conditions of service, an extra-departmental Branch Postmaster cannot be held to be a Government servant much less as holding a civil post under the Union Government. The learned Judges considered the entire set of departmental rules dealing with Pranch Post Offices and the appointment of Branch Postmasters as extra-departmental agents and came to the above conclusion. We are in respectful agreement therewith.

On behalf of the petitioner, *Brojo Gopal Sarkar* v. *Commissioner of Police and others*[1], was relied on. That was a case where a Special Constable was appointed under section 12 of the Calcutta Suburban Police Act. A Policeman so appointed was not entitled to any remuneration and had in fact to pay for his own uniform. But it was nevertheless held that he was the holder of a civil post within the meaning of Article 311 of the Constitution. We are not able to see how this decision helps the petitioner. The feature that was relied upon in that case centered upon section 13 of the Calcutta Suburban Police Act which laid down:

"Every Special Police Officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of Police."

Notwithstanding that no remuneration was attached to that post, the conferment of the same powers, privileges and protection which are available to the ordinary police officer obviously brought him within the scope of Article 311 of the Constitution.

Karuppa Udayar v. *State of Madras*[2], dealt with the case of a Village Karnam which post was held to be a civil post under the State of Madras within the meaning of Article 311 (1). The matter was not discussed, but the Court took the view that a Village Officer such as the Village Karnam, whether he is a hereditary officer or a non-hereditary officer, is a civil servant who holds the post under the State. It is obvious that in the case of a Karnam, there is a regular post of the office of Karnam attached to practically every village and when a person is appointed to such a post, it should not require much argument to conclude that he is the holder of a civil post. The present case we are concerned with is however easily distinguishable from that decision because it is not the case of the petitioner that he was appointed to a post which was in existence. In fact, it was his selection to perform certain postal duties that brought the post, if it can be so called, into existence.

In *Deenabandhu Sahu* v. *Jadumoni Mangaraj and others*[3], the question arose whether the assistance of an extra-departmental agent in a Branch Post Office taken by a candidate in canvassing for him in an election amounted to a corrupt practice within the meaning of the Representation of the People Act. The point for decision of the Supreme Court was whether these persons were in the service of the Government and belonged to any of the classes set out in section 123 of the Representation of the People Act. Though the judgment of the Supreme Court does not set out the details the conclusion reached was expressed in these terms:

"With reference to the last of the findings, it is possible to urge with some force that extra-departmental agents and presidents of Chowkidari Unions are not, having regard to their functions, government servants and that accordingly there was no contravention of section 123 (8)."

This authority is clearly against the petitioner's contentions.

The petitioner is not entitled to the protection guaranteed by Article 311 of the Constitution to civil servants. He was not a member of a civil service. Nor did

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1. A.I.R. 1955 Cal. 556.
2. (1956) 2 M.L.J. 15.
3. A.I.R. 1954 S.C. 411.

he hold any civil post. He was not a civil servant. In fact, he was not a servant at all. The relationship between the Government and the petitioner was not that of an employer and an employee. Even the petitioner's time was not at the disposal of the Government. The relations between the Postal Department of the Government and the petitioner were wholly contractual. He was only an agent for the discharge of specified functions of the Postal Department. That contract was terminated. Whether that termination was wrongful does not really arise for consideration in these proceedings. Article 311 cannot apply to termination of such contracts. It is true that the petitioner was not given a full opportunity to show cause against the termination of the contract of agency. But, in dealing with the case of an alleged breach of contract, there is no scope for invoking any principle of natural justice. If the rules framed by the Department are viewed as embodying the conditions of the contract, that is, as embodying some of the terms of the contract of agency, the position was that the agency could be terminated in such cases as the petitioner's without any need to give an opportunity to show cause against such termination. In any case, as we have said, there is no scope for attacking the validity of the termination of the contract on the ground it was opposed to principles of natural justice.

We hold that the petitioner is not entitled to the constitutional protection of Article 311. Nor is he otherwise entitled to challenge the validity of the order. The rule *nisi* is discharged and the petition is dismissed. No order as to costs.

K.L.B. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The State of Madras by the Secretary, Revenue Department, Madras and another .. *Appellants**

v.

The Urumu Seshachalam Chettiar Charities, Tiruchirapalli, by its Board of Trustees and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 3, 6 (4) *and* 6 (14)—*Applicability—Test of exclusiveness.*

It has been held in *Ramanasramam* v. *The Commissioner for Hindu Religious and Charitable Endowments Madras*, (1960) 2 M.L.J. 121 : I.L.R. (1960) Mad. 922, a religious institution like a temple would not be a Hindu religious institution or a Hindu religious endowment, unless it was exclusively Hindu in character. The same principle is also applicable to a charitable endowment.

The very definition of charitable endowment in section 6 (4) of the Madras Hindu Religious and Charitable Endowment Act (XIX of 1951) postulates the test of exclusiveness. Unless the benefit of the endowment is confined wholly to Hindus, it would not be a charitable endowment as defined in that section. The prefix "Hindu" to expression "public charitable endowmwnt" in section 3 emphasizes this feature. Section 3 cannot be invoked unless the endowment is exclusively Hindu in character.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 3rd March, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1034 of 1957, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G.O. Ms. No. 3705, dated 20th September, 1957, on the file of the State of Madras (Revenue Department) and to quash the order therein.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*M. M. Ismail*), for Appellants.

A. V. Narayanaswami Iyer, *R. Venkatachalam*, *S. Mohankumaramangalam* and *S. Ramaswami*, for Respondents.

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* W.A. No. 111 of 1959.

26th July, 1960.
(4th Sravana, 1882, Saka).

The Order of the Court was made by

Rajagopalan, J.—This is an appeal preferred by the State against the judgment of our learned brother Balakrishna Ayyar, J., in which he held that the charitable trusts founded by Urumu Seshachlam Chettiar did not constitute Hindu Public Charitable Endowments within the scope of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951). The learned Judge directed the issue of a writ of *certiorari* to set aside the Notification, dated 20th September, 1957, issued by the Government under section 3 of that Act, extending the provisions of that Act to these charities. That Act has since been repealed and has been replaced by the Hindu Religious and Charitable Endowments Act (XXII of 1959). There has been no change in the relevant statutory provisions we have to consider in this appeal. We shall refer to the statutory provisions of Act XIX of 1951, and we shall refer to it as the Act in the rest of this judgment.

Paragraph 4 of the Trust deed, dated 12th November, 1952, executed by Urumu Seshachalam Chettiar provided:

"The main objects of the Trust are :—

(*a*) To run Educational and Industrial Institutions.

(*b*) To provide facilities for poor, helpless, and deserving Hindu boys and girls to get themselves equipped physically, mentally and morally for leading a good life and be of service to themselves and to society.

(*c*) To train young people for the service of the country.

(*d*) To imbibe our ancient culture a d to inculcate the same into the minds of our young boys and girls; and

(*e*) To do such other things as may in the discretion of the trustees be good and beneficial for the social and educational advancement of the boys and girls."

The provision in paragraph 7 (*a*) of the Trust deed was :

"The trustees may for the purpose of carrying on the trust :—

acquire the Urumu Dhanalakshmi Vidyalayam and the Urumu Seshachalam Chetty Hindu Orphanage and similar other institutions, conduct those institutions and make all necessary additions alterations and improvements for the all round expansion of the trust."

Balakrishna Ayyar, J., pointed out that the Vidyalayam referred to in paragraph 7 (*a*) of the Trust deed was not a wholly Hindu institution, but it was open to members of other communities as well. The learned Judge referred in particular to clauses (*a*), (*c*), and (*e*) of paragraph 4 of the Trust deed, and his finding was :

"It is clear that the settlor intended to bene fit communities other than Hindus alone."

The correctness of the finding of the learned Judge, that the benefits of the charities founded by Seshachala under the Trust deed were not confined exclusively to Hindus, could not be assailed, and we did not understand the learned Advocate-General, who appeared for the State (appellant), to challenge the correctness of that finding.

After pointing out that the Act applied to (1) Hindu Religious Institutions and Endowments, and (2) Hindu Public Charitable Institutions and Endowments the learned Judge observed :

"The word 'Hindu' must be given the same connotation whether it is read in connection with religious institutions and endowments or whether it is read in connection with charitable institutions and endowments. Now, we can have a Hindu religious institution or a Christian religious institution or a Muslim religious institution. But I do not see how we can have a religious institution which is at one and the same time partly Hindu and partly Christian or partly Muslim."

The learned Judge observed further :

"There can be no doubt whatever that so far as religious institutions are concerned, the Act is intended to apply only to religious institutions and endowments which are exclusively Hindu in character."

With reference to the endowments created by Seshachala the final conclusion of the learned Judge was thus expressed :

"After having read the entire document and examined the various considerations urged by the learned counsel for the Respondents, I am clear in my mind that it would not be right to say that the institution or endowment set up by the deed of trust is exclusively Hindu in character. That means that section 3 of the Hindu Religious and Charitable Endowments Act cannot be invoked in relation to this institution."

We are in respectful agreement with Balakrishna Ayyar, J., when he stated that the word "Hindu" should be accorded the same significance in relation to both religious and charitable endowments in construing the scope of the Act and its provisions. The principle laid down by the learned Judge, that a religious institution like a temple would not be a Hindu religious institution or a Hindu religious endowment unless it was exclusively Hindu in character, was approved of by a Division Bench with reference to a temple in *Sri Ramanasramam* v. *Commissioner for Hindu Religious and Charitable Endowments, Madras*[1]. Ramaswami, J., expressed his agreement with the test of exclusiveness at pages 370-371 of the report and, Anantanarayanan, J., expressed his agreement with the test formulated by Balakrishna Ayyar, J., at page 378 of the report. That decision of a Division Bench is authority binding on us. Even had we been convinced that the test of exclusiveness formulated by Balakrishna Ayyar, J., with reference to both Hindu charitable endowments and Hindu religious endowments was not correct, we could only have referred the question for determination by a Full Bench, as the determination of that question necessarily involves an examination of the correctness of the decision of the Division Bench in *Ramanasramam* v. *Commissioner for Hindu Religious and Charitable Endowments, Madras*[1], which accepted that test as correct. We are not convinced that that decision requires reconsideration by a Full Bench. Normally that should have sufficed to reject this appeal. We shall, however, examine the question at issue, as if it were *res integra*. Was the test of exclusiveness formulated and applied by Balakrishna Ayyar, J., correct? To constitute a Hindu public charitable endowment within the scope of Act XIX of 1951 is it necessary that the benefits of the endowment should be confined exclusively to Hindus?

The Act did not define what a Hindu public charitable endowment was. Nor did it define a Hindu religious endowment. The Act, however, defined a charitable endowment in section 6 (4) and a religious endowment in section 6 (14). Section 6 (4) runs:

"'Charitable endowment' means all property given or endowed for the benefit of, or used as of right by, the Hindu or the Jain community or any section thereof, for the support or maintenance of objects of utility to the said community or section, such as rest-houses, choultries, patasalas, schools and colleges, houses for feeding the poor and institutions for the advancement of education, medical relief and public health or other objects of a like nature and includes the institution concerned."

Section 6 (14) is:

"'Religious endowment' or 'endowment' means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution."

Temple, which itself is a religious endowment as defined by section 6 (14), was defined in section 6 (17):

"'temple' means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of or used as of right by, the Hindu community or any section thereof, as a place of public religious worship."

The learned Advocate-General contended that such concepts as Hindu charitable endowments and Hindu Religious Endowments were well-known before these expressions were employed in Act XIX of 1951. They had been used in Madras Act II of 1927, which was repealed and replaced by Act XIX of 1951. These expressions were used when the Limitation Act was amended in 1929 and when Articles 134-A and 134-B were introduced. Articles 134-A and 134-B referred to Hindu, Muhammadan or Buddhist religious or charitable endowments. The Limitation

1. (1960) 2 M.L.J. 121 : I.L.R. (1960) Mad. 922 : 1960 M.W.N. 368.

Act did not define either what a Hindu or Muhammadan charitable endowment was. But, the learned Advocate-General contended, the concept was clear enough. The further submission of the learned Advocate-General was, that the factors to be taken into account in deciding what constituted a Hindu charitable endowment were: (1) was the endowment founded by a Hindu, that is, by a person who was governed by the personal law applicable to Hindus ; (2) was the trust or endowment valid tested by the personal law, the Hindu Law, applicable to the founder ; and (3) were the management and the devolution of the right to manage the trust regulated by the Hindu Law. The learned Advocate-General contended that to constitute a Hindu charitable endowment, or for the matter of that a Hindu religious endowment, it was not necessary that the benefits should be confined exclusively to Hindus. Even if the question, who the beneficiaries were, came into the picture at all in deciding whether a given endowment was a Hindu charitable endowment, it was enough if it was shown that the Hindus benefited by that endowment, even if it be that they shared those benefits with members of other communities. The learned Advocate-General referred to the passage at page 52 of Mukherjea's Hindu Law of Religious and Charitable Trust where the learned author set out the essentials of a valid religious or charitable trust that could be founded by a Hindu. The learned Advocate-General also referred to the passages in Chapter XI of Mulla's Hindu Law, 12th edition, which explained the factors necessary to establish the validity of a trust, that is, a public charitable endowment founded by a Hindu. The observations of Mukherji, J., in *Manohar Mukherji* v. *Bhubendranath Mukherji*[1], were also referred to.

We do not propose to express any concluded opinion of ours on the question, what constitutes a Hindu charitable endowment or a Hindu religious endowment, within the meaning of Article 134-A or Article 134-B. Nor is it necessary for us to decide what the common law concept or the Hindu Law concept of a Hindu public charitable endowment should be. We have to address ourselves to the question before us, what constitute a Hindu public charitable endowment within the meaning of section 3 of the Act, Act XIX of 1951. As we have pointed out, that expression was not defined by the Act. Obviously it has to be a charitable endowment, before it can be a Hindu public charitable endowment within the scope of section 3. Charitable endowment was defined by section 6 (4) of the Act. We shall leave out of account the reference to the Jain community in section 6 (4) and confine ourselves to the Hindu community. If we split up section 6 (4) into some of its component parts the resultant position is : (1) charitable endowment means all property given or endowed for the benefit of the Hindu community or any section thereof ; (2) charitable endowment means all property given or endowed for the support or maintenance of objects of the utility to the Hindu community or any section thereof; and (3) charitable endowment means all property used as of right by the Hindu community or any section thereof. The institutions themselves in each of these cases are included in the statutory expression "charitable endowment." Of course the word "exclusively" is not to be found in the definition. If that word can be read with this clause, that has to be read with reference to each of the three clauses we have mentioned above, that is, the endowment should be for the exclusive benefit of the Hindu community, or it should be used as of right exclusively by the Hindu community, or it should be for the support or maintenance of the objects of utility exclusively to the Hindu community. The use of the prefix "Hindu" should have the same significance with reference to charitable and religious endowments for the purposes of the Act. We have already pointed out that a temple is a religious endowment. Temple has been defined in section 6 (17) of the Act :

> "'temple' means a place by whatever designation known, used as a place of public religious worship, and dedication to, or for the benefit of or used as of right by, the Hindu community or any section thereof, as a place of public religious worship".

It seems clear to us that the very definition of temple in section 6 (17) of the Act postulates the test of exclusiveness. It will not be a temple at all as defined in section

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1. (1932) I.L.R. 60 Cal. 452 at 473 (F.B.).

6 (17) of the Act, if it is not dedicated for the benefit exclusively of the Hindu community or if it is not used as of right exclusively by the Hindu community. A place of public worship used as of right by members of all communities including the Hindus cannot be a temple as defined by section 6 (17); much less can it be viewed as a Hindu temple or a Hindu religious endowment. The expressions "for the benefit of" and "used as of right by the Hindu community" should, in our opinion, have the same significance in relation to charitable endowments, as they have in relation to temples which are religious endowments. They should have the same meaning in construing either section 6 (4) or section 6(17). In our opinion, even apart from the prefix "Hindu" in relation to public charitable endowments in section 3, the very definition of charitable endowments in section 6 (4) postulates the test of exclusiveness. Unless, for example, the benefit of the endowment is confined wholly to Hindus it would not be a charitable endowment as defined by section 6 (4). The prefix "Hindu" to the expression "public charitable endowment" in section 3 tends, if anything, to emphasise that feature. When the benefit of the endowments is made such a decisive feature of the statutory concept of a charitable endowment by the definition in section 6 (4) of the Act, we can see no scope for accepting the contention of the learned Advocate-General, that who the beneficiaries of the trust are is not determinative of the question, what constitutes a Hindu public charitable endowment for purposes of section 3 of the Act.

The learned Advocate-General submitted that anomalous results might follow if the test of exclusiveness were adopted in determining what constitutes a Hindu public charitable endowment within the scope of section 3 of the Act. The learned Advocate-General pointed out that normally no Hindu would contemplate exclusion of members of other communities from the benefit of the public charity familiarly known as a Water Pandal, if he were founding such a public charity. That was given only as an example. Establishment of a Water Pandal charity may be establishment of a public charitable endowment. But it is not every public charitable endowment that is brought within the scope of Act XIX of 1951. Every public charitable endowment founded by a Hindu does not become a Hindu charitable endowment. The mere fact that the founder was a Hindu is not enough even to make a trust or endowment a charitable endowment as defined by section 6 (4) of the Act. Certainly it is not enough to make it a Hindu public charitable endowment. To bring a public charitable endowment within the scope of section 3 of the Act it is necessary to establish first that it is a Hindu charitable endowment. It will not be a Hindu charitable endowment, if the benefit of the endowment can be shared as of right by members of the public other than Hindus.

We are in entire agreement with the conclusion of Balakrishna Ayyar, J:

". . . . . . I am clear in my mind that it would not be right to say that the institution or endowment set up by the deed of trust (by Seshachala) is exclusively Hindu in character. That means that section 3 of the Hindu Religious and Charitable Endowments Act cannot be invoked in relation to this institution."

The appeal fails and is dismissed with the costs of the first respondent.

Counsel fee Rs. 250.

K.L.B. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE SRINIVASAN.

Angamuthu Chettiar .. *Appellant**

v.

Muthayya Naidu *alias* Natesa Naidu .. *Respondent.*

Madras Indebted Agriculturists Temporary Relief Act (V of 1954), section 3—Scope—Suit for recovery of land with mesne profits—If "Suit for recovery of debt"—Section 5—Applicability.

The Proviso to section 3 of Madras Act V of 1954 makes clear, that, even if there is a money claim by way of mesne profits associated with a suit for recovery of land, the existence of such claim would not convert that suit into a suit for recovery of debt. It cannot be said that the Proviso refers only to suit by owner for recovery of possession and not to a suit by a usufructuary mortgagee seeking to obtain possession of the mortgaged property.

The fact that at the time of filing the application the decree-holder did not advance the plea that he refrained from making the application under the belief "in good faith" that section 3 of the Act did apply to the application, but put forward only when the objection was taken on the administrative side, suggests an after thought; which is hardly what section 3 implies by good faith. Hence the petitioner cannot avail the protection accorded by section 5 of the Act.

Appeal against the Order of the Court of the Subordinate Judge (Additional), Cuddalore, dated 18th December, 1958 and made in A.S. No. 62 of 1958 preferred against the Order of the Court of the District Munsif, Tindivanam, in E.P. No. 745 of 1957 in O.S. No. 594 of 1952.

P. C. Parthasarathy Ayyangar and *P. Parthasarathy Ayyangar*, for Appellant.

N. Suryanarayana and *V. K. Mahadeva Sastri*, for Respondent.

The Court delivered the following

JUDGMENT:—The appellant had obtained a decree for possession of immoveable property on 9th November, 1953. It would appear that the judgment-debtor had executed an usufructuary mortgage in favour of the appellant but had failed to place him in possession of the property. The suit was laid by the appellant for recovery of possession on the footing of the usufructuary mortgage in his favour. A decree followed both for possession and for mesne profits. The execution petition, which has led to the appeal, was filed on 20th November, 1957. It was clearly beyond three years from the date of the decree, and to the objection raised on the administrative side of the District Munsif's Court, an endorsement was made on the execution petition, setting up Ordinance V of 1953, Act V of 1954 and Act I of 1955, as saving the bar of limitation. The question that arose, therefore, was whether the bar of limitation was overcome by one or other or both the enactments.

The learned District Munsif held, and the lower appellate Court agreed with him that under Proviso 3 to section 3 of Act V of 1954, the suit for possession of land should not be deemed to be a suit for recovery of debt. In answer to the further contention that the period of time, during which the decree-holder believing in good faith that section 3 of the Act applied to the execution application, should also be excluded under section 5 of the Act, both the Courts held that the plea was far from convincing and could not avail the decree-holder. The execution petition was accordingly dismissed as barred by time. Hence this appeal.

The short question that arose is, therefore, clear. It is whether the bar of suits and applications which is provided for in section 3 of Act V of 1954 would apply to the present decree which is a decree for possession of land and for profits relating to the period during which the plaintiff was kept out of possession of the land. Section 3 states:

"No suit for the recovery of a debt shall be instituted, no application for the execution of a decree for payment of money passed in a suit for the recovery of a debt shall be made."

The question that arises is, therefore, whether this is a suit which would come within the scope of the expression "suit for the recovery of a debt". Debt has

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* A.A.A.O. No. 54 of 1959. 15th July, 1960. (24th Asadha, 1882, Saka).

been defined in the Act to mean any sum of money which a person is liable to pay under a contract for consideration received and includes rent in cash or kind which a person is liable to pay or deliver in respect of the lawful use and occupation of land. On a plain reading of the section, read with the definition of the expression " debt ", it would seem to follow that, where a suit is for recovery of possession of land, it would not be governed by section 3 of the Act. The Proviso to the section removes, to my mind, all possible ambiguity. It states :

> "Provided that a suit for possession of land shall not be deemed to be a suit for recovery of debt by reason merely of mesne profits being also prayed for."

This Proviso makes it clear that, even if there is a money claim by way of mesne profits associated with a suit for recovery of land, the existence of such claim would not convert that suit into a suit for recovery of a debt.

It is further argued by the learned counsel for the appellant that, in the suit in which the decree was passed, it was not mesne profits that was claimed. He would have it that this proviso only refers to a suit where a person, entitled to the possession of land as owner, sues for possession, and it would not apply to a case where an usufructuary mortgagee seeks to obtain possession of land, on the footing of the limited title in his favour. It seems to me that, on a careful consideration of the proviso, such a construction does not easily flow therefrom. The expression used "a suit for possession of land " is couched in perfectly general terms, and to impose a limitation upon it in the manner suggested by the above argument, seems opposed to the ordinary rules of construction of statutes. I am, therefore, inclined to agree with the view taken on the interpretation of the proviso by the Courts below.

The next argument is that, even assuming that section 3 is not applicable, section 5 gives the right of extended limitation to an applicant, who, believing in good faith that section 3 of the Ordinance or section 3 of the Act applied to such application refrained from making the application. Here again, I am faced with considerable difficulty. In all cases of execution petitions, which are on the face of it out of time, it is generally expected that the parties making applications should explain how the applications are in time. In this case, though the application was filed well over a year after three years' period had expired, the petitioner did not at the time of filing the application specifically explain how the application was in time. The executing Court therefore returned this application and it was resubmitted with the following : (This is the endorsement made by the counsel for the petitioner.)

> " The defendants are agriculturists and the Moratorium Acts apply to this E.P. The decree, holder also *bona fide* believed that be could not apply for execution because of Ordinance V of 1953-Act V of 1954 and Act I of 1955, and if the period of duration of the above Acts is excluded, this E.P. is in time."

The question that arises for consideration is whether the decree-holder refrained from making application under the belief, " in good faith " that section 3 of the Act did apply to the application. Apart from the counsel's endorsement upon the execution petition, no material is available, wherefrom I can gather that the decree-holder was under the honest, but mistaken impression about the legal position. The fact, that at the time of filing the application no such plea was advanced but was put forward only when the objection was taken on administrative side, suggests an afterthought, which is hardly what section 3 implies by good faith and refraining from making application on the basis of good faith. I have given the matter careful attention, and I find it difficult to sustain the contention that section 5 protects the petitioner-decree-holder in any way. I accordingly find that the conclusion of the lower Courts is right. The appeal is dismissed with costs. Leave granted.

K.L.B. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Valian .. *Petitioner**

v.

Mari Samban and others .. *Respondents.*

Madras Proprietary Estates Village Service Act (II of 1894), sections 9 and 11 (2)—Scope of.

The normal rule of harmonious construction has to be adopted in construing the scope of sections 9 and 11 (2) of the Madras Proprietary Estates Village Service Act, 1894. While section 9 permits the proprietor six weeks' time within which to appoint a person to a vacancy and send notice of that appointment to the Revenue Divisional Officer within the prescribed time, section 11 (2) empowers the Revenue Divisional Officer to make the appointment himself if the notice of appointment under section 9 is not received by him within the prescribed time. Section 9 does not prescribe any time within which notice of appointment should reach the Revenue Divisional Officer. The six weeks prescribed under section 9 do not include within it the date of receipt of the notice by the Revenue Divisional Officer. The expression "if the notice of appointment is not received within the prescribed time" in section 11 (2) of the Act could only mean "if, taking the normal means of communication available, notice of appointment is not received within a reasonable time after the expiry of the six weeks referred to in section 9 of the Act".

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in D. Dis. No. 14435 of 1956 on the file of the Collector of Tiruchirapalli, relating to the appointment of last grade village servant of Inam Kalpalayam village, Lalgudi Taluk, and also the records from the Revenue Divisional Officer, Musiri, in his L. Dis. No. 4631 of 1956 dated 3rd April, 1956 and quash the order of the Collector of Tiruchirapalli dated 6th September, 1957 in his said D. Dis. No. 14435 of 1956.

N. Arunachalam and *R. Venkatachalam*, for Petitioner.

E. R. Krishnan and The Additional Government Pleader (*M. M. Ismail*) on behalf of Respondents.

The Court made the following

ORDER.—The non-hereditary post of the Talayari of Kalpalayam village in Lalgudi Taluk, Tiruchirapalli district, fell vacant when its permanent incumbent died on 19th December, 1955. The appointment to that post was governed by the provisions of the Proprietary Estates Village Service Act II of 1894.

Section 8 of Act II of 1894, which I shall hereafter refer to as the Act, required the proprietor of the village or estate to inform the Revenue Divisional Officer of the vacancy within 30 days after its occurrence. The right to fill up the vacancy was given to the proprietor of the village by section 9 of the Act, the relevant portion of which directed:

"The proprietor of the village shall within six weeks appoint a person to such vacant office and send notice of the appointment in writing to the Revenue Officer in charge of the division in which the village is situated."

Section 10 (1) (ii) set out the statutory disqualifications. The relevant portion of section 11 (1) provided:

"If the Revenue Officer to whom notice of appointment is sent under section 9 considers the person appointed to be disqualified under sub-section (1) of the preceding section, he may at any time within three months from the date of the receipt by him of the said notice of appointment, and after giving notice to the parties concerned and making enquiry record his objections and call upon the proprietor to appoint another person and the proprietor shall thereupon do so and send notice of such new appointment to the said Revenue Officer within six weeks of such requisition."

Section 11 (2) directed:

"If the notice of appointment referred to in section 9 or the notice of the new appointment referred to in sub-section (1) is not received within the prescribed time, or if the person newly appointed under sub-section (1) is also considered by the said Revenue Officer, after giving notice and making inquiry

* W.P. No. 557 of 1958.

25th August, 1960.
(3rd Bhadra, 1881, Saka).

as aforesaid, to be disqualified as aforesaid, such officer may make the appointment himself by selecting a person duly qualified under section 10."

Section 11 (3) provided for an appeal and it ran :

"Whenever an appointment is disallowed under this section, an appeal shall lie to the District Collector within one month."

The vacancy arose on 19th December, 1955. The proprietor appointed the first respondent, Mari Samban. The nomination of Mari Samban was dated 29th January, 1956, which was within the period of six weeks for which section 9 provided. The nomination, however, reached the Revenue Divisional Officer on 31st January, 1956, which was one day beyond the period of six weeks.

The procedure adopted thereafter by the Revenue Officers was certainly not in accordance with the provisions of the Act, the relevant portions of which I have referred to above. If the notice of appointment dated 29th January, 1956 and received on 31st January, 1956, by the Revenue Divisional Officer was a valid notice of appointment, the Revenue Divisional Officer could have disallowed it only in the circumstances set out under section 11 (1) of the Act. If, however, it was not a valid notice of appointment, in the sense that it was not sent wtihin the statutory period for which section 9 provided, the Revenue Divisional Officer could exercise his power of appointment under section 11 (2). What the Revenue Divisional Officer, did on receipt of the notice of appointment dated 29th January, 1956, was to forward the papers to the Tahsildar. The Tahsildar purported to appoint the first respondent. The Tahsildar had certainly no jurisdiction to order any appointment. Against that order the petitioner purported to prefer an appeal to the Revenue Divisional Officer. There was no statutory provision for any appeal against the order of a Tahsildar. Nor could the Revenue Divisional Officer claim any appellate jurisdiction. The Revenue Divisional Officer however allowed the appeal of the petitioner on 3rd April, 1956, and in purported exercise of that appellate jurisdiction he appointed the petitioner. Mari Samban, the first respondent, and the proprietor, who has been impleaded as the second respondent in these proceedings, preferred appeals to the Collector against the order of the Revenue Divisional Officer dated 3rd April, 1956. Section 11 (3) of the Act, it should be remembered, was limited in its scope. It provided for an appeal only against the disallowance of an appointment. There was no disallowance as such by the competent authority in this case under section 11 (1) of the Act. Though the scope of section 11 (3) of the Act was limited, section 3 (3) of Madras Regulation VII of 1828 gave certain controlling powers to the Collector if the statutory conditions were satisfied. But it was not thise powers the Collector purported to exercise. He held that the notice of appointment sent by the proprietor was not within the time allowed by the Act, but the Collector purported to condone the delay of one day. The Collector allowed the appeal, set aside the order of the Revenue Divisional Officer and directed the appointment of the first respondent. It should be needless to point out that the Act did not empower the Collector to condone any delay, or to treat as valid a notice of appointment that did not conform to the statutory requirements of section 9 and section 11 (2).

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Collector dated 6th September, 1957. In purporting to condone the delay the Collector acted without jurisdiction.

Since the question was debated at length I shall record my opinion on the scope of section 9 and section 11 (2) of the Act. Section 9 permits the proprietor six weeks within which to appoint a person to the vacancy and send the notice of that appointment to the Revenue Divisional Officer. Section 11 (2) empowers the Revenue Divisional Officer to make the appointment himself, if the notice of appointment authorised by section 9 is not received within the prescribed time. While section 9 prescribes six weeks for the appointment and the intimation thereof by the proprietor, section 11 (2) refers to the receipt of the notice of appointment "within the prescribed time". Neither section 9 nor any other provision of the Act prescribes any time within which the notice of appointment should reach the Revenue Divisional Officer. The normal rule of harmonious construction has to be adopted in construing the

scope of sections 9 and 11 (2) read together. It should be remembered that the proprietor of the village has to send the notice to the Revenue Divisional Officer. Considering the distances and the normal means of communication even at the time when the Act was passed, 1894, it should be fairly obvious that no considerable delay was anticipated between the despatch of the nomination by the proprietor and its receipt by the Revenue Divisional Officer. Whether the notice of appointment was sent by post or delivered by messenger within the comparatively small area of a revenue division, there would have been no considerable delay in the transmission of the notice of appointment. The six weeks specifically prescribed by section 9 of the Act does not include within it the date of receipt by the Revenue Divisional Officer. Six weeks are allowed to the proprietor within which he has to appoint a person to the vacancy and send notice of that appointment to the Revenue Divisional Officer. The expression " if the notice of appointment is not received within the prescribed time " in section 11 (2) of the Act could only mean " if, taking the normal means of communication available, notice of appointment is not received within a reasonable time after the expiry of the six weeks referred to in section 9 of the Act ". It is by that test that the validity of the notice of appointment dated 29th January, 1956, but received by the Revenue Divisional Officer on 31st January, 1956, will have to be tested. Was it sent within the time allowed by section 9 and was it " received within the prescribed time" referred to in section 11 (2). The Revenue Divisional Officer never addressed himself to that question. He left the appointment to be made by the Tahsildar, and he himself purported to exercise an appellate jurisdiction. The Collector also did not go into the question. He held that there was a delay but purported to condone it.

Section 11 (3) which conferred appellate jurisdiction on the Collector is limited in its scope. An appeal is allowed against the disallowance of an appointment made by the proprietor, the disallowance having been ordered by the Revenue Divisional Officer. It was for the Collector to decide whether the order of the Revenue Divisional Officer, dated 3rd April, 1956, against which an appeal was preferred, was an order disallowing the appointment made by the proprietor. If that test was satisfied and the appeal was competent, it was for the Collector to decide whether the Revenue Divisional Officer was justified in disallowing the appointment of the first respondent. The grounds on which a disallowance could be ordered have been specified in section 11 (1) of the Act. Even if the appeal fell outside the scope of section 11 (3) of the Act, whether the Collector had any controlling power or revisional jurisdiction to set aside an irregular order of the Revenue Divisional Officer may also arise for consideration. None of these factors was taken into account by the Collector. As I said, the procedure adopted all through, by the Tahsildar, by the Revenue Divisional Officer and by the Collector was one not sanctioned by the provisions of the Act.

The order of the Collector will be set aside by the issue of a writ of *certiorari*, which in effect means the Collector will have to dispose of the "appeals" preferred to him afresh and in accordance with law. I have refrained from deciding the validity or otherwise of the order of the Revenue Divisional Officer dated 3rd April, 1956. The petitioner had the benefit of it, and he did not seek that order being set aside in these proceedings. Besides it is for the Collector to decide in the first instance whether the order dated 3rd April, 1956, should be set aside at all either in the exercise of any appellate or revisional jurisdiction. That was why I refrained from pronouncing on the validity or otherwise of the order of the Revenue Divisional Officer dated 3rd April, 1956.

The rule *nisi* is made absolute and the petition is allowed. No order as to costs.

R.M. *Petition allowed.*

[END OF VOLUME (1960) 2 M.L.J. (Reports).]

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[1960]

I.L.R. (1960) Mad.			M.L.J.			I.L.R. (1960) Mad.			M.L.J.		
1	(F.B.)	=	(1959)	2	521	468		=	(1960)	1	176
24		=	,,	,,	555	472		=	,,	,,	284
35		=	(1960)	1	209	479		=	,,	,,	326
46		=	,,	,,	46	481		=	,,	,,	150
51		=	,,	,,	270	486		=	,,	,,	94
55		=	(1959)	2	542	490		=	(1960)	2	50
60		=	,,	,,	516	500		=	(1960)	1	434
68		=	(1960)	1	272	508		=	,,	,,	351
71		=	(1959)	2	443	512		=	(1960)	2	318
76		=	,,	,,	440	522		=	,,	,,	314
81		=	,,	,,	541	529		=	,,	,,	86
83		=	,,	,,	463	537		=	,,	,,	542
87		=	(1960)	1	164	549		=	,,	,,	116
94		=	,,	,,	273	557		=	(1960)	1	328
97	(F.B.)	=	,,	,,	1	559		=	,,	,,	135
115		=	,,	,,	125	562		=	,,	,,	412
130		=	,,	,,	263	567		=	(1960)	2	67
142		=	,,	,,	100	570		=	,,	,,	450
157		=	,,	,,	118	573		=	(1961)	1	3
171		=	,,	,,	298	586		=	(1960)	2	458
194		=	(1959)	2	466	612		=	,,	,,	96
197		=	(1960)	1	401	623		=	(1960)	,,	416
204		=	(1960)	2	191	639		=	(1960)	1	481
211		=	(1960)	1	157	642		=	,,	,,	396
224		=	,,	,,	112	646		=	(1960)	2	143
234		=	,,	,,	380	648		=	(1960)	1	464
245		=	,,	,,	376	654		=	,,	,,	330
252		=	,,	,,	240	657		=	(1960)	2	145
264		=	,,	,,	322	660		=	,,	,,	81
267		=	,,	,,	367	668		=	,,	,,	75
282		=	,,	,,	347	679		=	,,	,,	70
286		=	,,	,,	171	687		=	(1960)	1	385
290		=	,,	,,	146	697		=	(1960)	2	290
294		=	,,	,,	173	737		=	,,	,,	93
300		=	(1960)	2	48	743		=	,,	,,	68
303		=	,,	,,	152	747	(F.B.)	=	,,	,,	30
308		=	,,	,,	187	766		=	,,	,,	452
315		=	(1960)	1	232	773		=	,,	,,	102
322		=	,,	,,	257	785		=	,,	,,	110
333		=	(1960)	2	182	796		=	,,	,,	363
341		=	,,	,,	332	800		=	,,	,,	55
355		=	(1960)	1	325	814		=	—		
358		=	,,	,,	319	821		=	(1960)	2	63
362		=	,,	,,	398	826		=	,,	,,	475
369		=	,,	,,	323	829	(F.B.)	=	,,	,,	425
371		=	,,	,,	137	871		=	,,	,,	157
377		=	,,	,,	405	873		=	,,	,,	178
386		=	,,	,,	230	880		=	,,	,,	219
390		=	,,	,,	236	893		=	,,	,,	211
392		=	,,	,,	410	897		=	,,	,,	499
397		=	,,	,,	415	904		=	—		
407		=	(1960)	2	401	917		=	(1960)	2	507
433		=	(1960)	1	288	922		=	,,	,,	521
440		=	,,	,,	152	948		=	,,	,,	213
449		=	(1960)	2	150	954		=	,,	,,	207
452		=	(1960)	1	467	961	(F.B.)	=	,,	,,	230
455		=	,,	,,	445	976		=	,,	,,	43

I.L.R. (1960) Mad.		M.L.J.		
984	=	(1960)	2	266
991	=	,,	,,	262
999	=	,,	,,	533
1011	=	(1961)	1	107
1026	=	,,	,,	116
1050	=	(1960)	2	340
1059	=	(1961)	1	30
1064	=	,,	,,	16
1067	=	(1960)	2	205
1072	=	,,	,,	361
1076	=	—		
1078	=	(1960)	2	257
1082	=	—		
1102	=	(1960)	2	282
1115	=	(1961)	1	48
1130	=	(1960)	2	550
1139	=	,,	,,	259
1144	=	,,	,,	516
1164	=	,,	,,	89
1170	=	,,	,,	370
1173	=	,,	,,	555
1179	=	,,	,,	510

73 L.W.		M.L.J.		
1 (F.B.)	=	(1960)	1	1
11	=	,,	,,	319
13	=	,,	,,	75
16	=	—		
19	=	(1960)	1	142
22	=	,,	,,	148
24	=	,,	,,	367
32	=	,,	,,	157
39	=	,,	,,	405
44	=	,,	,,	232
47	=	(1960)	2	182
52	=	(1960)	1	137
54	=	(1960)	2	187
58	=	(1960)	1	398
61	=	,,	,,	380
67	=	(1960)	2	48
68	=	(1960)	1	240
75	=	,,	,,	257
81	=	,,	,,	94
82	=	(1959)	1	111
85	=	(1960)	1	150
88	=	(1959)	1	153
91	=	(1960)	1	146
93	=	,,	,,	230
95	=	,,	,,	410
97	=	,,	,,	415
103	=	—		
106	=	—		
110	=	—		
112	=	(1960)	1	330
113	=	(1960)	2	150
115	=	(1960)	1	135
116	=	,,	,,	467
117	=	,,	,,	284
121	=	(1960)	2	152
124	=	(1960)	1	288
128	=	(1960)	2	318
134	=	—		
138	=	(1960)	1	412
141	=	(1960)	1	488
143	=	,,	,,	168
145	=	(1960)	2	332
153	=	(1960)	1	460
157	=	—		

73 L.W.		M.L.J.		
161	=	(1960)	1	396
163 (1)	=	,,	,,	236
163 (2)	=	,,	,,	481
165	=	,,	,,	164
169	=	,,	,,	351
171	=	,,	,,	215
177	=	—		
183	=	(1960)	1	464
186	=	(1960)	2	143
187	=	,,	,,	314
191	=	(1960)	1	434
195	=	—		
198	=	(1960)	2	86
202	=	,,	,,	18
203	=	(1960)	1	178
207	=	,,	,,	176
209	=	,,	,,	328
210	=	,,	,,	118
218	=	,,	,,	273
222	=	,,	,,	329
223	=	,,	,,	323
224	=	—		
230	=	—		
233	=	(1960)	1	237
236	=	,,	,,	385
242	=	(1960)	2	542
249	=	,,	,,	89
252	=	(1960)	2	450
253	=	,,	,,	81
258	=	,,	,,	148
260	=	(1961)	1	46
262	=	,,	,,	140
265	=	,,	,,	135
267	=	,,	,,	116
271	=	—		
273	=	(1960)	1	225
278	=	—		
281	=	(1960)	2	275
282	=	(1960)	1	140
284	=	—		
290	=	(1960)	1	67
291	=	,,	,,	96
297	=	,,	,,	326
299	=	(1960)	2	55
307	=	,,	,,	448
308	=	(1960)	1	134
309	=	—		
310	=	(1960)	2	93
313	=	(1960)	1	362
315	=	,,	,,	445
323	=	(1960)	2	70
327	=	,,	,,	68
329	=	,,	,,	475
330	=	,,	,,	63
333	=	(1960)	1	478
336	=	(1960)	2	110
340	=	,,	,,	155
341	=	(1961)	1	10
343	=	—		
345	=	—		
347	=	(1961)	1	499
351	=	,,	,,	363
358 (F.B.)	=	,,	,,	30
369	=	,,	,,	102
377	=	,,	,,	157
378	=	,,	,,	205
380	=	,,	,,	43
385	=	—		
392	=	(1961)		207
396	=	(1960)	1	947
401	=	(1960)	2	559

73 L.W.		M.L.J.		
406	=		,,	452
410	=	(1961)	1	3
417	=	,,	,,	178
421	=	,,	,,	16
422	=	(1960)	1	213
426	=	,,	,,	503
430	=	—		
432	=	—		
433	=	(1960)	1	266
437	=	,,	,,	392
445	=	,,	,,	211
447	=	—		
449	=	(1960)	1	349
450	=	,,	,,	361
452 (F.B.)	=	,,	,,	425
475	=	(1961)	1	30
477	=	,,	,,	245
480	=	,,	,,	507
483	=	,,	,,	257
486	=	,,	,,	202
489	=	,,	,,	13
491 (F.B.)	=	,,	,,	230
499	=	,,	,,	262
504	=	,,	,,	259
506	=	,,	,,	487
508	=	,,	,,	147
509	=	,,	,,	382
512	=	—		
513	=	(1961)	1	243
516	=	(1960)	1	81
518	=	(1959)	2	446
523	=	—		
525	=	(1959)	2	551
529	=	—		
531	=	(1960)	2	274
533	=	,,	,,	327
534	=	,,	,,	270
535	=	,,	,,	325
537	=	,,	,,	323
538	=	,,	,,	271
541	=	—		
551	=	(1960)	2	360
552	=	—		
553	=	—		
558	=	(1960)	2	328
561	=	—		
565	=	(1960)	2	489
572	=	(1961)	1	1
573	=	,,	,,	340
578	=	,,	,,	219
585	=	—		
594	=	(1961)	1	495
597	=	,,	,,	533
604	=	,,	,,	516
616	=	,,	,,	346
620	=	,,	,,	511
625	=	,,	,,	527
630	=	,,	,,	89
631	=	,,	,,	539
634	=	,,	,,	386
640	=	—		
649	=	—		
653	=	(1961)	1	107
662	=	—		
665	=	—		
666	=	—		
670	=	—		
671	=	(1961)	1	598
674	=	—		
675	=	(1961)	1	416
684	=	—		
686	=	—		
688	=	(1961)	1	351
692	=	—		
699	=	(1961)	1	85
702	=	,,	,,	568
703	=	,,	,,	484
706	=	,,	,,	583
708	=	,,	,,	573
711	=	—		
713 (F.B.)	=	(1961)	1	65
730	=	,,	,,	510
731	=	—		
732	=	(1961)	1	560
733	=	,,	,,	93
741	=	,,	,,	596
743	=	,,	,,	370
744	=	(1960)	2	376
747	=	,,	,,	555
750	=	—		
752	=	(1960)	2	479
756	=	,,	,,	477
758	=	,,	,,	145
760	=	(1960)	1	263
766	=	,,	,,	347
768	=	,,	,,	376
773	=	,,	,,	325
774	=	(1960)	2	121
788	=	,,	,,	50
794	=	,,	,,	591

1960 M.W.N.		M.L.J.		
1 (S.C.)	=	(1960) S.C.J.		901
6 (S.C.)	=	(1960)	2	69
9 (S.C.)	=	(1960) S.C.J.		195
14 (S.C.)	=	,,	,,	521
17	=	(1960)	1	81
19	=	,,	,,	332
21	=	,,	,,	134
22	=	,,	,,	78
25	=	(1960)	2	152
27	=	(1960)	1	86
28	=	,,	,,	376
31	=	,,	,,	323
33	=	,,	,,	84
34	=	(1960)	2	187
37 (S.C.)	=	(1960) S.C.J.		879
46	=	(1960)	1	380
51	=	,,	,,	398
54	=	,,	,,	171
56	=	,,	,,	319
57	=	—		
62	=	(1960)	1	75
65	=	,,	,,	367
72	=	(1959)	2	440
74	=	(1960)	2	13
79	=	(1960)	1	405
83	=	,,	,,	178
87	=	(1960)	2	182
91	=	(1960)	1	137
93	=	(1960)	2	48
94	=	(1960)	1	165
98 (.S.C)	=	(1960) S.C.J.		1092
104 (S.C.)	=	,,	,,	402
114	=	(1960)	1	257
119	=	,,	,,	150
122 (S.C.)	=	(1960) S.C.J.		543
127	=	(1960)	1	288
131	=	,,	,,	146

(1960) M.W.N.			M.L.J.		
133	(F.B.)	=	,,	,,	1
142		=	,,	,,	96
145		=	—		
149	(S.C.)	=	(1960) S.C.J.		160
153		=	(1960)	1	275
154		=	—		
156		=	(1960)	1	94
157	(S.C.)	=	(1960) S.C.J.		1
161	(S.C.)	=	—		
167		=	(1960)	2	332
173		=	(1960)	1	328
174		=	,,	,,	284
177		=	,,	,,	135
178		=	,,	,,	125
186		=	(1959) M.L.J. (Cr.)		266
187		=	,,		330
188		=	,,		467
189		=	—		
195		=	(1959) M.L.J, (Cr.)		410
197		=	,,		326
198		=	,,		494
200		=	,,		488
202		=	,,		237
204		=	,,		46
206		=	(1959)	2	417
207		=	,,	,,	455
214		=	,,	,,	506
219		=	(1960)	1	475
222		=	—		
224		=	(1960)	2	18
225		=	(1960)	1	329
226		=	—		
228		=	(1960)	2	158
230		=	—		
233	(S.C.)	=	(1960) M.L.J. (Cr.)		228
238		=	,,		550
241		=	(1960)	2	137
243	(S.C.)	=	,,	,,	64
247		=	—		
251		=	(1960)	1	225
255		=	(1960)	2	116
258		=	—		
259		=	(1961)	1	18
261		=	—		
265		=	—		
269		=	—		
279		=	(1960)	2	148
280		=	—		
284		=	(1960)	2	75
289		=	,,	,,	140
292		=	,,	,,	135
295		=	,,	,,	89
298		=	(1960)	1	247
303		=	,,	,,	86
306		=	(1961)	1	33
316		=	(1960)	2	67
317		=	—	—	
323		=	(1960)	2	450
324		=	,,	,,	448
325	(S.C.)	=	(1960) M.L.J. (Cr.)		462
328		=	,,	,,	449
329	(S.C.)	=	(1961) S.C.J.		166
332		=	,,	,,	458
345		=	,,	,,	110
349		=	,,	,,	219
356		=	,,	,,	96
361		=	,,	,,	55
368		=	,,	,,	121
380		=	,,	,,	478
382		=	—		
385		=	(1960)	2	81
389	(F.B.)	=	,,	,,	30
399		=	—		
402		=	(1960)	2	213
405		=	—		
410		=	(1960)	2	503
414		=	,,	,,	449
417		=	—		
419		=	—		
420		=	(1960)	2	452
423		=	,,	,,	254
426		=	(1960)	2	178
429		=	,,	,,	43
433		=	,,	,,	392
440		=	(1960) M.L.J. (Cr.)		824
446		=	,,	,,	63
448		=	,,	,,	145
449		=	,,	,,	93
452		=	(1961)	1	46
454		=	,,	,,	475
455		=	—		
456		=	—		
457	(S.C.)	=	(1960) M.L.J. (Cr.)		398
463	(S.C.)	=	,,		340
471	(S.C.)	=	,,		224
474		=	,,		831
475		=	,,		473
476		=	,,		474
477		=	—		
481		=	—		
486		=	—		
487		=	—		
489		=	—		
492		=	—		
493		=	(1960) M.L.J. (Cr.)		68
495		=	,,		487
497		=	,,		226
500		=	,,		102
506		=	—		
510		=	—		
512		=	—		
518		=	—		
520		=	—		
523	(S.C.)	=	(1960) M.L.J. (Cr.)		59
524		=	—		
528		=	—		
535		=	—		
538		=	—		
542		=	(1960) M.L.J. (Cr.)		340
546		=	,,		361
548		=	(1961) 1 M.L.J.		30
548		=	(1961)	1	30
550		=	,,	,,	16
551		=	(1960)	2	245
554		=	(1961)	1	43
555		=	,,	,,	507
558		=	,,	,,	455
560	(S.C.)	=	(1960)	1	96
564		=	(1960)	2	266
567	(S.C.)	=	(1960)	1	101
580		=	(1960)	2	533
586		=	—		
587		=	(1960) M.L.J. (Cr.)		834
589		=	,,		833
591		=	(1960)	2	262
594		=	,,	,,	349
596		=	,,	,,	202
598	(F.B.)	=	,,	,,	230
607		=	—		
611		=	(1960)	2	382
612		=	,,	,,	262

(1960) M.W.N.		M.L.J.	(1960) M.W.N.		M.L.J.
618	=	—	747 (F.B.)	=	,, ,, 425
621	=	—	767	=	,, ,, 484
627	=	—	769	=	,, ,, 376
631 (S.C.)	=	(1961) M.L.J. (Cr.) 21	771	=	,, ,, 573
635 (S.C.)	=	,, 15	774 (S.C.)	=	(1960) S.C.J. 713
639 (S.C.)	=	,, 20	776 (S.C.)	=	,, 671
640 (S.C.)	=	—	782 (F.B.)	=	(1961) 1 65
660 (S.C.)	=	—	797 (S.C.)	=	—
664 (S.C.)	=	(1960) M.L.J. (Cr.) 794	808 (S.C.)	=	—
667 (S.C.)	=	—	811	=	—
678 (S.C.)	=	—	816	=	(1961) 1 85
685 (S.C.)	=	—	818 (S.C.)	=	—
691	=	(1960) 2 243	826	=	—
693	=	,, ,, 271	829	=	(1961) 1 87
695	=	—	830	=	—
696	=	(1960) 2 386	832	=	(1960) 2 568
702	=	—	833	=	,, ,, 477
705	=	—	835 (1)	=	—
711	=	(1961) 1 89	835 (2)	=	—
713	=	(1960) 2 495	839	=	(1961) 1 100
716	=	,, ,, 539	844	=	(1960) 2 591
718	=	,, ,, 248	848	=	—
723	=	—	850	=	(1960) 2 596
724	=	—	851	=	—
725	=	(1960) 2 217	856	=	—
726	=	—	858	=	—
728	=	—	860	=	—
730	=	—	861	=	—
731	=	(1960) 2 510	864 (S.C.)	=	—
732	=	,, ,, 370	868 (S.C.)	=	(1961) S.C.J. 22
733	=	,, ,, 561	875	=	—
735	=	—	876	=	—
743	=	(1960) 2 372	879	=	—

(1960) 1 M.L.J.		73 L.W.		1960 M.W.N.		I.L.R. (1960) Mad.
1 (F.B.)	=	1 (F.B.)	=	133 (F.B.)	=	97 (F.B.)
12	=	—	=	(1959) M.W.N. 569	=	(1959) Mad. 1032
20	=	72 L.W. 787	=	—	=	—
21	=	585	=	—	=	958
27	=	—	=	—	=	—
37	=	—	=	(1959) M.W.N. 637	=	—
38	=	633	=	—	=	— 1061
44	=	—	=	630	=	—
46	=	640	=	(1960) M.W.N. 204	=	(1960) Mad. 46
49	=	—	=	—	=	—
53	=	514	=	—	=	—
58	=	—	=	—	=	—
62	=	568	=	—	=	—
66	=	235	=	—	=	(1959) Mad. 576
75	=	73 L.W. 13	=	62	=	—
79	=	—	=	22	=	—
81	=	516	=	17	=	—
83	=	—	=	(1959) M.W.N. 581	=	—
84	=	—	=	(1960) M.W.N. 33	=	—
86	=	—	=	27	=	—
87	=	—	=	(1959) M.W.N. 663	=	—
89	=	72 L.W. 651	=	601	=	(1959) Mad. 1046
94	=	73 L.W. 81	=	(1960) M.W.N. 156	=	(1960) Mad. 486.
96	=	—	=	142	=	—
100	=	—	=	—	=	142
108	=	72 L.W. 572	=	—	=	—
112	=	799	=	(1959) M.W.N. 676	=	224
118	=	73 L.W. 210	=	590	=	157
125	=	—	=	(1960) M.W.N. 178	=	115
134	=	308	=	21	=	—
135	=	115	=	177	=	559
137	=	52	=	91	=	371

(1960) 1 M.L.J.	73 L.W	(1960) M.W.N.	I.L.R. (1960) Mad.
140	—	—	—
142	19	—	—
146	91	131	290
148	22	—	—
150	85	119	481
152	—	—	440
157	32	(1959) M.W.N. 642	(1960) Mad. 211
164	165	620	87
168	143	—	—
171	72 L.W. 807	(1960) M.W.N. 54	286
173	—	—	924
176	73 L.W. 207	—	468
178	203	83	—
183	72 L.W. 55	(1959) M.W.N. 104	(1959) Mad. 452
187	225	—	—
194	36	—	—
199	609	(1959) M.W.N. 473	(1959) Mad. 859
209	691	—	(1960) Mad. 35
215	73 L.W. 171	—	—
221	—	—	—
225	273	(1960) M.W.N. 251	—
230	93	—	386
232	44	—	315
236	163 (1)	—	390
237	233	202	—
240	68	—	252
247	396	298	—
252	72 L.W. 41	—	—
257	73 L.W. 75	114	322
263	760	(1959) M.W.N. 656	130
270	72 L.W. 620	—	51
272	650	706	68
273	73 L.W. 218	648	94
275	281	(1960) M.W.N. 153	—
276	72 L.W. 770	(1959) M.W.N. 688	—
284	73 L.W. 117	(1960) M.W.N. 174	472
288	124	127	433
292	—	—	—
298	72 L.W. 752	(1959) M.W.N. 734	171
311	71 L.W. 807	—	—
318	72 L.W. 804	—	—
319	73 L.W. 11	(1960) M.W.N. 56	358
322	72 L.W. 786	(1959) M.W.N. 631	264
323	73 L.W. 223	(1960) M.W.N. 31	—
325	773	—	355
326	297	197	479
328	209	173	557
329	222	225	—
330	112	187	654
332	—	19	—
334	—	(1959) M.W.N. 362	—
339	72 L.W. 764	597	—
341	—	585	—
346	809	—	—
347	73 L.W. 766	662	282
349	—	681	—
351	169	—	508
354	—	703	—
356	—	685	—
360	—	—	—
362	313	—	—
364	—	627	—
367	24	(1960) M.W.N. 65	267
376	768	28	245
380	61	46	234
385	236	—	687
391	—	—	—
396	161	—	642
398	58	51	362
401	72 L.W. 778	(1959) M.W.N. 719	197
405	73 L.W. 39	(1960) M.W.N. 79	377

(1960) 1 M.L.J.		73 L.W.		1957 M.W.N.		I.L.R. (1960) Mad.
410	=	95	=	195	=	392
412	=	138	=	—	=	562
415	=	97	=	—	=	397
420	=	72 L.W. 285	=	—	=	(1959) Mad. 256
429	=	—	=	(1959) M.W.N. 37	=	353
434	=	73 L.W. 191	=	—	=	(1960) Mad. 500
439	=	—	=	—	=	—
445	=	315	=	—	=	455
452	=	72 L.W. 372	=	316	=	—
460	=	73 L.W. 153	=	—	=	—
464	=	183	=	—	=	648
467	=	116	=	(1960) M.W.N. 188	=	452
468	=	—	=	(1959) M.W.N. 632	=	—
(1960) 1 M.L.J.		73 L.—		1957 M.W.N.		I.L.R. (19Wo) Mad.
472	=	—	=	—	=	—
475	=	—	=	(1960) M.W.N. 219	=	—
478	=	73 L.W. 333	=	380	=	—
481	=	163 (2)	=	—	=	639
483	=	72 L.W. 742	=	—	=	—
488	=	73 L.W. 141	=	200	=	—
490	=	—	=	—	=	—
494	=	—	=	198	=	—

(1960) 2 M.L.J.		73 L.W.		(1960) M.W.N.		I.L.R. (1960) Mad.
1	=	—	=	—	=	—
7	=	72 L.W. 660	=	(1959) M.W.N. 562	=	—
11	=	806	=	—	=	—
13	=	—	=	(1960) M.W.N. 74	=	—
18	=	73 L.W. 202	=	224	=	—
20	=	—	=	—	=	—
22	=	—	=	—	=	—
30 (F.B.)	=	358 (F.B.)	=	389 (F.B.)	=	747 (F.B.)
43	=	380	=	429	=	976
48	=	67	=	93	=	300
50	=	788	=	—	=	490
55	=	299	=	361	=	800
63	=	330	=	446	=	821
66	=	—	=	—	=	—
67	=	290	=	316	=	367
68	=	327	=	493	=	743
70	=	323	=	—	=	679
75	=	—	=	284	=	668
81	=	253	=	385	=	660
86	=	198	=	303	=	529
89	=	249	=	295	=	1164
93	=	310	=	449	=	737
96	=	291	=	356	=	612
102	=	369	=	500	=	773
110	=	336	=	345	=	785
116	=	267	=	255	=	549
121	=	774	=	368	=	921
135	=	—	=	292	=	—
136	=	—	=	—	=	—
137	=	265	=	241	=	—
140	=	262	=	289	=	—
143	=	186	=	—	=	646
145	=	758	=	448	=	657
147	=	508	=	—	=	—
148	=	258	=	279	=	—
150	=	113	=	—	=	449
152	=	121	=	25	=	303
155	=	340	=	—	=	—
157	=	377	=	—	=	871
158	=	—	=	228	=	—
161	=	—	=	—	=	—
165	=	—	=	94	=	—
169	=	—	=	—	=	—
173	=	71 L.W. 844	=	—	=	—

(1960) 2 M.L.J.		73 L.W.		(1960) M.W.N.		I.L.R. (1960) Mad.
178	=	73 L.W. 417	=	426	=	873
182	=	47	=	87	=	333
187	=	54	=	34	=	308
191	=	72 L.W. 782		(1959) M.W.N. 723	=	204
195	=	71 L.W. 757		(1958) M.W.N. 631	=	—
202	=	73 L.W. 486		(1960) M.W.N. 596	=	—
205	=	378	=	—	=	1067
207	=	392	=	—	=	954
211	=	445	=	—	=	893
213	=	422	=	402	=	948
217	=	—	=	725	=	—
219	=	578	=	349	=	880
226	=	—	=	497	=	—
230 (F.B.)	=	491 (F.B.)	=	598 (F.B.)	=	961 (F.B.)
241	=	—	=	—	=	—
243	=	513	=	691	=	—
245	=	477	=	551	=	—
248	=	—	=	—	=	—
254	=	—	=	423	=	—
257	=	483	=	—	=	1078
259	=	504	=	—	=	1139
262	=	499	=	591	=	991
266	=	433	=	564	=	984
270	=	534	=	—	=	—
271	=	538	=	693	=	—
274	=	531	=	—	=	—
276	=	—	=	—	=	—
282	=	—	=	—	=	1102
290	=	—	=	—	=	697
313	=	—	=	—	=	—
314	=	187	=	—	=	522
318	=	128	=	—	=	512
323	=	537	=	—	=	—
325	=	535	=	—	=	—
327	=	533	=	—	=	—
328	=	558	=	—	=	—
332	=	145	=	167	=	341
340	=	543	=	542	=	1050
346	=	616	=	—	=	—
349	=	449	=	594	=	—
351	=	688	=	—	=	—
355	=	—	=	—	=	—
360	=	551	=	—	=	—
361	=	450	=	546	=	1072
363	=	351	=	612	=	796
370	=	743	=	732	=	1107
372	=	—	=	743	=	—
376	=	744	=	769	=	—
379	=	—	=	—	=	—
381	=	—	=	—	=	—
382	=	509	=	611	=	—
384	=	—	=	—	=	—
386	=	634	=	696	=	—
392	=	437	=	433	=	—
401	=	—	=	—	=	407
416	=	675	=	—	=	623
425 (F.B.)	=	452 (F.B.)	=	747 (F.B.)	=	829 (F.B.)
448	=	307	=	524	=	—
449	=	—	=	238	=	—
450	=	252	=	323	=	570
452	=	406	=	420	=	766
455	=	—	=	558	=	—
458	=	—	=	332	=	586
473	=	—	=	475	=	—
474	=	—	=	476	=	—
475	=	329	=	454	=	826
477	=	756	=	833	=	—
479	=	752	=	—	=	—
484	=	703	=	767	=	—
487	=	506	=	495	=	—
489	=	565	=	—	=	—

(1960) 2 M.L.J.		73 L.W.		(1960) M.W.N.		I.L.R. (1960) Mad.
495	=	594	=	713	=	—
499	=	347	=	414	=	897
503	=	426	=	410	=	—
507	=	480	=	555	=	917
510	=	730	=	731	=	1179
511	=	620	=	—	=	—
516	=	604	=	—	=	1144
527	=	625	=	—	=	—
533	=	597	=	580	=	999
539	=	631	=	716	=	—
542	=	242	=	—	=	537
550	=	401	=	—	=	1130
555	=	747	=	—	=	1173
558	=	—	=	—	=	—
560	=	732	=	—	=	—
561	=	—	=	733	=	—
564	=	—	=	—	=	—
568	=	702	=	832	=	—
570	=	—	=	—	=	—
573	=	708	=	771	=	—
577	=	—	=	—	=	—
583	=	706	=	—	=	—
585	=	—	=	—	=	—
591	=	794	=	844	=	—
596	=	741	=	850	=	—
598	=	671	=	—	=	—